Supreme Court, U.S.
FILED

No. 04 423 SEP 24 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHINA NORTH INDUSTRIES CORP.,
a Chinese entity a/k/a Norinco,

Petitioner,

v.

LILIAN S. ILETO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. POLLARD
BAKER & MCKENZIE LLP
130 East Randolph Drive
Chicago, IL 60601

CHARLES H. DICK, JR.*
COLIN H. MURRAY
BAKER & MCKENZIE LLP
101 West Broadway
12th Floor
San Diego, CA 92101
(619) 236-1441

* *Counsel of Record*

Counsel for Petitioner

189263

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The federal judiciary should not be in the business of developing the legislative policy of the State of California. Yet here, the United States Court of Appeals for the Ninth Circuit did just that, essentially enacting its own vision of enlightened gun control policy by its bold pronouncement of a novel new tort cause of action, styled "negligent distribution" of firearms.

> The debate over the extent to which gun manufacturers should be held liable to victims of gun violence belongs in the democratic process. The public debate benefits from able advocates on all sides—we [the federal judiciary] need not enter it.

(App. A. at 70a (Hall, C.J., dissenting).)

Every other federal circuit court of appeal that has been asked to venture into this realm of policymaking has respectfully declined the invitation, deeming gun control policy to be the sole province of the legislature. Undeterred by the unanimous principled reticence of its sister circuits, the Ninth Circuit forged ahead, unabashedly eschewing any requirement to support its policymaking foray with even the barest thread of state precedent.

As such, the Ninth Circuit was not exercising the proper judicial power of a federal court sitting in diversity. It was sitting as a self-appointed superlegislature of the State of California. Therefore, the questions presented are:

1. Whether, under principles of federalism, a federal court's creation of a novel new tort of "negligent distribution" of

of firearms under its diversity jurisdiction is an improper arrogation of power by the federal judiciary, where a state's gun control policy is a nonjusticiable matter traditionally reserved to the state legislature.

2. Whether a common law tort imposing a duty on a manufacturer to refrain from the production, sale, and distribution of a lawful non-defective product violates the Commerce Clause.

PARTIES TO THE PROCEEDINGS BELOW

The following persons were plaintiffs-appellants to the proceedings below and are Respondents to this petition, but their names have been omitted from the caption hereto for administrative convenience: Joseph S. Ileto, deceased; JOSHUA STEPAKOFF, a minor, by his parents, Loren Lieb and Alan B. Stepakoff; MINDY GALE FINKELSTEIN, a minor, by her parents, David and Donna Finkelstein; BENJAMIN KADISH, a minor by his parents, Eleanor and Charles Kadish; and NATHAN LAWRENCE POWERS, a minor, by his parents, Gail and John Michael Powers, for himself and on behalf of a class of persons similarly situated.

The following persons were defendants-appellees to the proceedings below and have no interest in these proceedings where all claims against such parties were dismissed by the court below: DAVIS INDUSTRIES, a California Corporation; REPUBLIC ARMS INC., a California Corporation; JIMMY L. DAVIS, an individual; BUSHMASTER FIREARMS, a Maine Corporation; MAADI, an Egyptian business entity; IMBEL, a Brazilian business entity; THE LOANER PAWNSHOP TOO, a Washington Corporation; and DAVID MCGEE, an individual.

The following persons were defendants-appellees to the proceedings below but are not petitioners hereto and are being served as respondents: GLOCK INC., a Georgia Corporation; GLOCK GMBH, an Austrian business entity; RSR MANAGEMENT CORPORATION; and RSR WHOLESALE GUNS SEATTLE INC.

CORPORATIONS RELATED TO CORPORATE PARTIES

Petitioner China North Industries Corp., a/k/a Norinco ("China North" or "Petitioner") is a limited liability corporation organized and existing under the laws of the People's Republic of China ("PRC"), a sovereign state. Petitioner is wholly owned by the PRC and is licensed and registered to operate as a state-owned enterprise.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	iii
Corporations Related to Corporate Parties	iv
Table of Contents	v
Table of Cited Authorities	viii
Table of Appendices	xiv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
I. Factual Background	2
II. Proceedings Below	5
Reasons for Granting the Petition	8
I. Principles Of Federalism Preclude The Federal Judiciary From Independently Adjudicating Novel Issues Of State Law That Are Of Vital Concern To The Public Policy Of The State	9

Contents

Page

A. The Ninth Circuit's Creation of This Novel New Tort Was a Blatant Nullification of California Law. 9

B. The Decision of the Court Below Conflicts With This Court's Precedents Barring the Federal Government From Invading the Domain of the State Legislature. 12

C. Certification of the Issue to the California Supreme Court Was Required. 14

II. The Decision Below Created A Serious Policy Split Among The Circuits Concerning The Power Vested In A Federal Court To Create A State's Public Policy 16

III. A Common Law Tort Duty Restricting Lawful Commerce In Firearms Violates The Commerce Clause 19

A. The Regulatory Effects of This Tort Are Direct and Produce Sweeping Extraterritorial Effects. 19

B. The Ninth Circuit's Dormant Commerce Clause Analysis Was Erroneous. 20

Contents

Page

IV. This Issue Is One Of Great Importance, Transcending The Dispute Between The Parties To This Action 24

A. The Tort Will Significantly Disrupt Economic Activity. 24

B. The Decision Below Will Disrupt International Comity. 25

Conclusion 26

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Acadia Motors v. Ford Motor Co.,
44 F.3d 1050 (1st Cir. 1995) 17

Albright v. Oliver,
510 U.S. 266 (1994) 4

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 15, 16

Armijo v. Ex Cam, Inc.,
656 F.Supp. 771 (D. N. Mex. 1987),
aff'd, 843 F.2d 406 (10th Cir. 1988) 17-18

Berman v. Parker,
348 U.S. 26 (1954) 10

BMW of North America v. Gore,
517 U.S. 559 (1996) 7, 19

Brecht v. Abrahamson,
507 U.S. 619 (1993) 12

Brown-Forman Distillers Corp.
v. N.Y. Liquor Authority,
476 U.S. 573 (1986) 7

Camden County Board of Chosen Freeholders
v. Beretta, U.S.A. Corp.,
273 F.3d 536 (3d Cir. 2001) 17

Cited Authorities

Page

Caron v. United States,
524 U.S. 308 (1998) 21

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 20

City of Philadelphia v. Beretta U.S.A. Corp.,
277 F.3d 415 (3d Cir. 2002) 17

City of Philadelphia v. Lead Industrial Association,
994 F.2d 112 (3d Cir. 1993) 17

Crosby v. National Foreign Trade Council,
530 U.S. 363 (2000) 20, 21

Day-Brite Lighting, Inc. v. Missouri,
342 U.S. 421 (1952) 13, 17

Dickerson v. New Banner Institute, Inc.,
460 U.S. 103 (1983) 21

Edgar v. Mite Corp.,
457 U.S. 624 (1982) 19-20

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 13

Hamilton v. Beretta U.S.A. Corp.,
222 F.3d 36 (2d Cir. 2000) 16, 17

Cited Authorities

Page

Hines v. Davidowitz,
312 U.S. 52 (1941) 20

Huddleston v. United States,
415 U.S. 814 (1974) 22, 23

Kaiser Steel Corp. v. W.S. Ranch Co.,
391 U.S. 593 (1968) 13, 17

Klaxon Co. v. Stentor Electric Manufacturing Co.,
313 U.S. 487 (1946) 9

Kremen v. Cohen,
325 F.3d 1035 (9th Cir. 2003) 15-16

Leavitt v. Jane L.,
518 U.S. 137 (1996) 14

Louisiana Power & Light Co.
v. City of Thibodaux,
360 U.S. 25 (1959) 13, 14, 15, 17

Meredith v. Winter Haven,
320 U.S. 228 (1943) 11

Patterson v. Rohm Gesellshaft,
608 F. Supp. 1206 (N.D. Tex. 1985) 18

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 7

Cited Authorities

	Page
Printz v. United States, 521 U.S. 898 (1997)	12
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	19
State Farm Mutual Auto Insurance Co. v. Campbell, 538 U.S. 408 (2003)	19
Taylor v. Phelan, 9 F.3d 882 (10th Cir. 1993)	17
United States v. Lopez, 514 U.S. 549 (1995)	12
United States v. Morrison, 529 U.S. 598 (2000)	12
United States v. Standard Oil Co., 332 U.S. 301 (1947)	13
White v. Smith & Wesson Corp., 97 F. Supp. 2d 816 (N.D. Ohio 2000)	18

Page

STATE CASES

City of San Diego v. U.S. Gypsum Co.,
30 Cal. App. 4th 575 (1994) 11

Doe v. City & County of San Francisco,
136 Cal. App. 3d 509 (1982) 10

Galvan v. Superior Court,
70 Cal. 2d 851 (1969) 10

Merrill v. Navegar,
26 Cal. 4th 465 (2001) 10, 11

Myers v. Philip Morris Cos., Inc.,
28 Cal. 4th 828 (2002) 10

Sippel v. Nelder,
24 Cal. App. 3d 173 (1972) 10

UNITED STATES CONSTITUTION

Amend. X 2, 12, 26

Art. I, § 8, cl. 3 1

Cited Authorities

Page

STATUTES

18 U.S.C. §§ 921-931 ..... 2, 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1330 5

28 U.S.C. § 1603 5

Cal. Civ. Code § 1714.4 10

Cal. Gov. Code § 53071 10

P.L. 99-308, § 1(b), 100 Stat. 449 (1986) 21

S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968) 21, 23

RULES

CAL. RULES OF COURT R. 29.8(a) 15

Fed. R. Civ. P. 12(b) 4, 5

Fed. R. Civ. P. 54(b) 6

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed November 20, 2003 ..... 1a

Appendix B — Order Re: Defendant China North's Motion To Dismiss First Amended Complaint Of The United States District Court For The Central District Of California Filed March 25, 2002 .... 71a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed May 28, 2004 .... 111a

China North respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the Central District of California, dismissing Respondents' claims, is reported at 194 F. Supp. 2d 1040 (C.D. Cal. 2002). (App. B, *infra*, 71a.) The Opinion of the United States Court of Appeals for the Ninth Circuit, reversing the district court, is reported at 349 F.3d 1191 (9th Cir. 2003). (App. A, *infra*, 1a.) The Order of the Ninth Circuit denying the Petitioner's petition for rehearing and suggestion for rehearing en banc is reported at 370 F.3d 860 (9th Cir. 2004). (App. C, *infra*, 111a.)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 20, 2003. The court of appeals entered its order denying the Petitioner's timely petition for rehearing and suggestion for rehearing en banc on May 28, 2004. Justice O'Connor subsequently extended the time to file this Petition to and including September 24, 2004. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I, § 8, cl. 3, vesting the power in Congress "[t]o regulate commerce with foreign nations, and among the several States."

U.S. CONST. amend. 10: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

18 U.S.C. §§ 921-931 (2004) ("Title IV of the Omnibus Crime Control and Safe Streets Act of 1968" and the "Gun Control Act of 1968"), regulating all firearms transactions affecting interstate commerce.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This case arises from two highly publicized shooting incidents in the Los Angeles area in the summer of 1999. Petitioner is alleged to be the manufacturer of one of the many firearms the assailant, Buford O. Furrow, Jr., had in his possession at the time of the shooting.

Mr. Furrow's crime was both shocking and tragic. On August 10, 1999, Furrow approached the North Valley Jewish Community Center ("JCC") in Granada Hills, California. He entered the JCC and, in an act of hate filled racially motivated violence, shot and injured three children, one teenager, and one adult. After fleeing the JCC, and with the same firearms in his possession, Furrow shot and killed Joseph Ileto, an employee of the U.S. Postal Service and the son of Respondent, Lilian Ileto, while Ileto was delivering his mail route. Each of these violent assaults was a random, unexpected criminal act.[1]

1. Criminal charges for the murder of Ileto and for interference with the civil rights of several of the victims were brought against (Cont'd)

Among the evidence recovered at both crime scenes were 9mm ammunition casings. Although Furrow had at least seven firearms in his possession at the time, only two of those firearms chambered 9mm ammunition: a "Norinco" model 320, a brand manufactured by the Petitioner, and a "Glock" model 26, a brand manufactured by appellee-defendant, Glock Inc. and/or Glock GmbH. At the time of the 1999 shootings, Furrow's possession of firearms was illegal: Furrow had been prohibited under federal law, 18 U.S.C. § 922(d), from possessing, purchasing, or using any firearm. He had previously been committed to a psychiatric hospital in 1998, placed under felony indictment in 1998, and convicted of assault in the second degree on May 21, 1999, in Washington State.

Respondents sued Petitioner, along with other defendant firearms manufacturers, distributors, and dealers, asserting negligence and public nuisance claims. The Complaint alleged in broad strokes that defendants produce, distribute, and sell more firearms than legal purchasers can buy and that they knowingly facilitate, and benefit from, a secondary market where illegal purchasers may obtain their firearms. Respondents did not allege that defendants did anything illegal. Rather, the allegations instead focus on defendants' "distributional conduct." (*See* App. A at 8a-14a.) Respondents allege that defendants failed to '"exercise reasonable care to protect the public' from the risks created by the distribution and marketing schemes that create an illegal secondary

---

(Cont'd)
Furrow in the District Court for the Central District of California on August 11, 1999. Furrow pleaded guilty to multiple counts on January 24, 2001. The Hon. Nora M. Manella sentenced Furrow to multiple life terms in prison on March 26, 2001.

market." (App. C at 114a (Callahan, J., dissenting) (quoting Respondents' First Amended Complaint at ¶ 33).)[2]

Respondents allege some specific facts tracing the chain of distribution of the Glock model, which Respondents allege Furrow used to kill Mr. Ileto. In stark contrast, Respondents did not allege any specific facts about the Norinco or otherwise demonstrate the existence of a causal connection between Petitioner's lawful manufacture of its products in the PRC and Mr. Furrow's illegal possession of the Norinco model 320 found at the scene of the crime.[3] Nor did Respondents allege any causal link between the Norinco firearm and Respondents' injuries.[4]

---

2. Because this Petition comes before this Court on appeal of the denial of a motion to dismiss under FED. R. CIV. P. 12(b)(6), all well-pleaded allegations are presumed true. *Albright v. Oliver*, 510 U.S. 266, 268 (1994). However, China North adamantly denies engaging in any "distributional conduct" in the United States, much less the targeting of an illegal secondary market.

3. The Ninth Circuit conceded that "the specific allegations in the [Complaint] that trace the Glock gun . . . ultimately to Furrow do not apply to Norinco." (App A at 50a-51a.) The Ninth Circuit instead relied on "general allegations" in its reversal of the district court's dismissal of the claims against Petitioner. (App. A at 51a.)

4. Although the Ninth Circuit said that "Furrow shot and killed Ileto with his Norinco gun," (App. A at 6a), in fact, this statement misstates the record. Respondents never alleged that the Norinco was used in the crime against Mr. Ileto. The Respondents instead alleged that "[o]n information and belief, Mr. Ileto was shot with the Glock model 26."

II. PROCEEDINGS BELOW

1. On October 17, 2001, Respondent first served Petitioner with the Complaint, which had been filed in Los Angeles Superior Court more than a year earlier.[5] On November 14, 2001, Petitioner removed the action to the United States District Court for the Central District of California under 28 U.S.C. § 1330 and 28 U.S.C. § 1603, on the ground that Petitioner is an instrumentality of a foreign state and, therefore, the district court had original jurisdiction. On December 6, 2001, the district court determined both that removal had been proper and that the district court had jurisdiction over the action.

2. All defendants moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6). On March 26, 2002, the district court entered an order granting defendant Glock's motion to dismiss all claims. The district court dismissed the

---

5. Respondents initially filed a complaint in Los Angeles Superior Court on August 9, 2000, against Petitioner along with other co-defendants, alleging seven causes of action. The first two claims were brought by Ms. Ileto against all defendants, for survival and wrongful death. The remaining claims were brought by all Respondents against all defendants: for public nuisance, negligence, negligent entrustment, and unfair business practices. The Complaint sought certification of a class, damages, and injunctive relief. The Superior Court granted the demurrers of defendants Glock Inc. and Bushmaster Firearms Inc. and dismissed all claims with leave to amend. Respondents filed a First Amended Complaint ("FAC") on May 23, 2001. The FAC retained Ms. Ileto's survival and wrongful death claims, all Respondents' negligence and public nuisance claims, and the prayer for damages. Respondents did not reassert their remaining claims, including the class claims and the claim for injunctive relief. All defendants who had been served joined in renewed demurrers.

nuisance claim, holding that California law did not support a nuisance claim for the distribution of a non-defective product. The district court also ruled that Respondents failed to allege facts that would support a finding that the defendants were in control of the nuisance at the time of the injury.

The district court also dismissed the negligence claim, holding that Respondents had failed to allege facts supporting a finding that the defendants owed them a duty or that defendants' actions were the proximate cause of Respondents' injuries. On June 11, 2002, the district court directed the entry of final judgment in favor of all moving defendants pursuant to Fed. R. Civ. P. 54(b).

3. The Respondents filed their Notice of Appeal on July 10, 2002. On appeal, the Respondents pursued only two of their original claims, the negligence and public nuisance claims. The United States Court of Appeals for the Ninth Circuit held Respondents' claims sounding in nuisance to be legally cognizable, finding that Respondents had stated a claim by alleging that defendants "created a firearms market that is over-saturated and their conduct ha[s] unreasonably interfered with public safety and health." (App. A at 40a.)

The Ninth Circuit also held that the negligence claim was legally cognizable, ruling that firearm manufacturers, distributors, and dealers as a whole had a duty not to oversupply the firearms market. The Ninth Circuit ruled that this duty could be breached where it was "reasonably foreseeable that . . . a person like Furrow who was prohibited by law from purchasing a gun would be able to purchase one" in light of such oversupply. (App. A at 37a.)

4. The Ninth Circuit also held that the Commerce Clause did not bar the suit. Using a dormant Commerce

Clause analysis under the Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Ninth Circuit reasoned that the alleged tort duty was not discriminatory and produced only indirect effects on interstate commerce. Furthermore, the Ninth Circuit held that a suit for compensatory damages would not otherwise produce any extraterritorial effects. (App. A at 53a-55a (distinguishing *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 n.17 (1996).) As such, the Ninth Circuit concluded that the suit was not barred by the Commerce Clause where the State's interest was legitimate and where the burden on commerce was "indirect." (App. A at 55 (citing *Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 578-79 (1986).)

5. The Ninth Circuit therefore reversed the district court's dismissal of the Respondents' claims against Petitioner, Glock, and RSR (the distributor for the Glock) on the negligence, public nuisance, survival, and wrongful death claims, and remanded to the district court for further proceedings. However, the Ninth Circuit affirmed the district court's orders granting dismissal of the Respondents' action against Bushmaster, Republic Arms, Jimmy Davis, and Davis Industries, reasoning that "a claim for nuisance and negligence cannot stand where the weapons [manufactured or supplied by these entities] were not actually fired." (App. A at 51a-52a.)

7. On December 18, 2003, Petitioner filed a petition for rehearing of the panel decision with a suggestion for rehearing en banc. On May 28, 2004, the Ninth Circuit denied the petition. Eight circuit judges dissented from the denial. Seven judges joined a dissenting opinion authored by the Hon. Consuelo Callahan. The Hon. Alex Kozinski penned a separate vigorous dissent, which five circuit judges joined.

REASONS FOR GRANTING THE PETITION

This is truly an "extraordinary case"—fully deserving of this Court's attention and its judicious grant of discretionary review. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). The decision of the Ninth Circuit below represents an unprecedented arrogation of power by the federal judiciary—a bare assertion of de facto regulatory power over matters beyond its jurisdictional competence. Here, the Ninth Circuit essentially overlooked—indeed, even tortured—California law in its unbridled enthusiasm to impose its own view of enlightened gun control policy on the State of California. As such, the Ninth Circuit was not exercising the judicial power of a court sitting in diversity. It was sitting as a self-appointed superlegislature of the State of California.

The decision of the Ninth Circuit merits review by this court, *first* to determine whether, under our system of federalism, a federal court may create a new common law tort cause of action that directly contravenes established state policy, independent of any action by the State's legislature. *Second*, review by this Court is necessary to determine whether a common law tort of "negligent distribution of firearms" is barred by the power granted to Congress under the Commerce Clause where such tort not only has direct and sweeping extraterritorial effects on interstate commerce, but also conflicts with a comprehensive federal regulatory regime. *Third*, whether the common law may impose a restraint of trade on non-defective products is an issue of exceptional importance requiring resolution by this Court to forestall the potential disruption to interstate and foreign commerce that is likely to arise absent this Court's review.

I. PRINCIPLES OF FEDERALISM PRECLUDE THE FEDERAL JUDICIARY FROM INDEPENDENTLY ADJUDICATING NOVEL ISSUES OF STATE LAW THAT ARE OF VITAL CONCERN TO THE PUBLIC POLICY OF THE STATE

The decision of the Ninth Circuit merits review and correction by this Court where principles of federalism preclude blatant nullification of state law by the federal judiciary on a matter of public policy specifically reserved to the state legislature.

A. The Ninth Circuit's Creation of This Novel New Tort Was a Blatant Nullification of California Law.

The decision of the court below was no "*Erie* Guess." It was instead policymaking clothed in the black robes of adjudication. It is axiomatic that a federal court's job is "to ascertain what the state law is, *not what it ought to be.*" (App. A at 56a (Hall, J., dissenting) (quoting *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1946).) As such, a federal court may not forge a construction of state law in a way that is not clearly foreshadowed by state precedent.

But here, the Ninth Circuit strayed even farther from its permissible role. In creating this new tort, the Ninth Circuit *nullified* existing California law in clear contravention of the established policy of the California Legislature.

First, under California law, it is expressly "the intention of the Legislature to occupy the whole field" of the regulation of the registration or licensing of firearms, as encompassed

by the provisions of the Penal Code. CAL. GOV. CODE § 53071 (Deering's 2004). Interpretive state law reinforces the fact that the occupation of the field by the California Legislature bars any judicial action that does more than merely interpret the existing statutes and regulations. *Galvan v. Superior Court*, 70 Cal. 2d 851, 869 (1969); *Sippel v. Nelder*, 24 Cal. App. 3d 173, 176-77 (1972) (stating that any expansion of the law "is properly a matter for the Legislature and not the courts"); *see also Doe v. City & County of San Francisco*, 136 Cal. App. 3d 509, 518 (1982).

Furthermore, at the time of the incident, the California Legislature had also expressly precluded any tort liability by a manufacturer for the sale or distribution of non-defective firearms products. *See* CAL. CIV. CODE § 1714.4 (Deering's 2002); *see also Merrill v. Navegar*, 26 Cal. 4th 465, 483 (2001) (precluding liability of firearms manufacturers for the acts of third parties under § 1714.4). As was stated by Judge Hall below, "[T]he plain terms of this statue preclude appellant's theory of causation." (App. A at 58a (Hall, J. dissenting).)[6]

This should have been the end of the matter. *See Berman v. Parker*, 348 U.S. 26, 31-33 (1954): "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . ."

However, ignoring California statutory authority and purporting instead to "interpret" the common law, the

---

6. The California Legislature repealed § 1714.4 effective January 1, 2003, but its repeal does not affect this action. The California Legislature did not express an intent to apply its repeal retroactively. *See Myers v. Philip Morris Cos., Inc.*, 28 Cal. 4th 828, 840 (2002).

Ninth Circuit below proceeded to rewrite California negligence law by interpreting duty and causation in a way that was not only novel, but revolutionary—imposing a duty on a manufacturer to reduce both production and profits whenever it becomes (or should become) aware that the output of its product, all of which is legally sold, tends to create a "surplus" in a secondary market. Indeed, this was no "*Erie* Guess." California's highest court had specifically rejected this very same tort theory only two years earlier. *Merrill v. Navegar*, 26 Cal. 4th at 483 (holding that no cause of action could lie for a tort claim of "negligent marketing and distribution" of firearms).

Next, the Ninth Circuit extended public nuisance law in a way that was unprecedented both in California and nationwide. No California court has ever held—as did the Ninth Circuit here—that a public nuisance claim could be launched against a manufacturer of non-defective products lawfully placed in the stream of commerce. Again, this was not a case of the Ninth Circuit answering a difficult question under its diversity jurisdiction "with the aid of such light as was afforded by the materials for decision at hand." *Meredith v. Winter Haven*, 320 U.S. 228, 238 (1943). The Ninth Circuit instead disregarded California appellate court authority, fashioning an all-encompassing construction of nuisance law in a veritable feeding frenzy of judicial activism, "devour[ing] in one gulp the entire law of tort." *See City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 585-86 (1994) ("Nuisance cases "universally" concern the use or condition of property, *not products*." (emphasis added)).

B. The Decision of the Court Below Conflicts With This Court's Precedents Barring the Federal Government From Invading the Domain of the State Legislature.

The system of government established by our Constitution is one of dual sovereignty in which the States retain "a residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting THE FEDERALIST No. 39, at 245 (J. Madison)). A number of constitutional provisions reflect the conservation of state sovereignty, but at the heart of them lies the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. AMEND. X.

This Court has recently reinforced the constitutional limitations on the powers of the federal government, vis-à-vis the police power reserved to the states. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (striking down the Gun-Free School Zones Act of 1990, stating that "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law'") (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)); *see also United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Congress could not establish a civil remedy for a victim of gender-motivated violence, because such a remedy invaded the police power reserved to the states, stating that "under our federal system that remedy must be provided by the Commonwealth of Virginia, and *not by the United States*") (emphasis added)).

This limitation of power vis-à-vis the states applies with equal force to the federal judiciary. First, this limitation of power is generally exhibited in an overriding limitation on the federal judiciary's freedom to create new common law liabilities outside of the constitutional arena. *See United States v. Standard Oil Co.*, 332 U.S. 301, 313 (1947) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). Thus, the federal judiciary may not appoint itself as a superlegislature, fashioning a novel common law claim to correct for the shortcomings of legislative judgment in response to some perceived public policy problem. *See Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952). As Judge Hall noted in her dissenting opinion in this case, a federal court "may not expand the authoritative pronouncements of a state's law in search of ways to reach what we view as a just result." (App. A at 69a.)

Second, this Court's precedents specifically require the federal judiciary to abstain from adjudicating issues that impinge on a state's public policy. This Court has repeatedly cautioned the federal judiciary that it must "stay its hand" from adjudicating novel issues of state law in those limited "special circumstances" where the dispute involves areas of vital public policy concern. *See Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594-95 (1968) (requiring the court of appeals to stay its hand concerning the adjudication of a novel state law issue involving water rights); *accord La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959):

> The special nature of eminent domain justifies a district judge, when his familiarity with the problems of local law so counsels him, to ascertain

> the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised—rather than himself make a dubious and tentative forecast.

This case also exemplifies the type of "special circumstances," where the federal judiciary must "stay its hand" from adjudicating a matter of essential state policy "intimately involved with sovereign prerogative." *Id.* at 28. First, this case involves a novel tort claim foreshadowed by no California precedent. Second, the issue of gun control is a matter of public policy reserved to the legislature—few issues so deeply invoke the state's police power or so characterize state sovereignty as the state's regulation of the sale, use, and possession of firearms within its borders so as to assure the health, safety, and welfare of its citizens. Third, the issue of gun control is highly controversial, rendering it an especially unsuitable topic for policymaking by the unelected judiciary. *See Leavitt*, 518 U.S. at 144-45 (vacating and summarily reversing the court below, stating that "the underlying substantive issue in this case is a controversial one, generating a kind of hydraulic pressure that motivates ad hoc decisionmaking"). If ever there were a case where the Ninth Circuit should have stayed its hand, this was that case.

C. Certification of the Issue to the California Supreme Court Was Required.

The Ninth Circuit otherwise committed substantial error, adding insult to injury, in proceeding to create this novel

tort cause of action without certifying the issue to the California Supreme Court for determination:

> The final irony is that the panel's decision, its impact on California and manufacturers, and its infringement on principles of federalism, were avoidable. Pursuant to Rule 29.8(a) of the California Rules of Court, we could have, *and should have*, certified the issues of California law to the California Supreme Court.

(App. C at 124a (Callahan, J., dissenting) (emphasis added).) This Court has encouraged the process of certification any time a court of appeals encounters "[n]ovel, unsettled questions of state law.[7] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). A heightened need for certification exists where, as here, the issue involves essential state policy. *Cf. La. Power & Light Co.*, 360 U.S. at 25.

Here, the Ninth Circuit essentially imposed the equivalent of a strict product liability standard upon the manufacturer of a product that was not defective. This was a public policy decision not properly made by a federal court sitting in diversity. (*See* App. C at 126a-27a (Callahan, J. dissenting).) Tellingly, here *seven* judges signed on to Judge Callahan's dissent, decrying the Panel's failure to certify this issue to the California Supreme Court.[8]

---

7. Under California law, the state supreme court may decide a question of California law submitted to it by a federal court of appeals if: "(1) the decision could determine the outcome of a matter pending in the requesting court, and (2) there is no controlling precedent." CAL. RULES OF COURT R. 29.8(a).

8. Even Judge Kozinski, admittedly a proponent of a more limited approach to the certification doctrine, *see Kremen v. Cohen*, (Cont'd)

Indeed, in *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 42 (2d Cir. 2000), a substantially similar case, the Second Circuit found certification to be necessary to properly "aid the efficient administration of justice for both state and federal courts." In *Hamilton*, upon certification of the question, the New York Court of Appeals, in a unanimous decision, flatly declined to adopt the novel theory of liability. *See* 264 F.3d 21 (2d Cir. 2001). The Second Circuit therefore vacated and remanded the action to the district court with instructions to dismiss the Respondents' complaint. *Id.* at 32.

A federal court simply may not reach out and create a state's public policy unless there is no alternative. *See Arizonans for Official English*, 520 U.S. at 75-80. Here, there was a reasonable, clear, and fully accessible alternative to the bold act of judicial legislation exhibited by the Ninth Circuit.

II. THE DECISION BELOW CREATED A SERIOUS POLICY SPLIT AMONG THE CIRCUITS CONCERNING THE POWER VESTED IN A FEDERAL COURT TO CREATE A STATE'S PUBLIC POLICY

The decision of the Ninth Circuit has created a policy schism among the circuits with respect to the reticence a federal court must show when asked to adjudicate matters of state legislative policy. This schism not only creates legal uncertainty regarding the power of the federal courts to create new common law causes of action, but also threatens to create a particularly insidious form of forum shopping.

(Cont'd)
325 F.3d 1035, 1044 (9th Cir. 2003) (Kozinski, J. dissenting), joined in the dissenting opinion here, criticizing the Ninth Circuit for its failure to certify this case to the California Supreme Court.

The majority of the federal circuits have followed the directives of this Court in *Kaiser Steel, Louisiana Power & Light Co.*, and *Day-Brite Lighting, Inc.*, holding that a federal court is not empowered by its diversity jurisdiction to create a new tort cause of action, especially where that tort duty will interfere with or otherwise invade public policy matters committed to the state legislature. *See, e.g., Acadia Motors v. Ford Motor Co.*, 44 F.3d 1050, 1057 (1st Cir. 1995) (chiding the district court for "overstep[ing] the bounds of its authority and enter[ing] territory properly left to the Maine legislature"); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993) ("Federalism concerns require that we permit state courts to decide whether and to what extent they will expand state common law."); *Taylor v. Phelan*, 9 F.3d 882, 887 (10th Cir. 1993) ("As a federal court, we are generally reticent to expand state law without clear guidance from its highest court; but where the expansion directly affects state . . . functions, we should take extra care.").

Applying this principle, the federal circuit courts of appeal have uniformly declined to create a new tort imposing liability on gun manufacturers, distributors, and dealers for the criminal acts of third parties. *See, e.g., Hamilton*, 222 F.3d at 36 (certifying the "policy-laden inquiry" to the state supreme court for resolution); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001) ("It is not the role of a federal court to expand or narrow state law in ways not foreshadowed by state precedent."); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) ("Federal courts may not engage in judicial activism."); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D. N. Mex. 1987) (refusing to impose negligence tort liability upon a gun manufacturer, stating that "[t]o recognize such a cause of action in New Mexico would

require an abrogation of the common law in a way bordering on judicial legislation"), *aff'd* 843 F.2d 406 (10th Cir. 1988); *see also Patterson v. Rohm Gesellshaft*, 608 F. Supp. 1206, 1216 (N.D. Tex. 1985) ("[A]s a judge, I know full well that the question of whether handguns can be sold is a political one . . . and that this is a matter for the legislatures, not the courts.").[9]

The decision below has created a policy split among the circuits concerning the proper limitations on the power of the federal judiciary to determine a state's legislative policy. Furthermore, this split encourages a particularly insidious form of forum shopping, not only effectively funneling plaintiffs with ambitious "negligent distribution" claims concerning all types of products sold or used in California[10] from state to federal court—but also producing a gravitational pull for these type of claims to the courts of the Ninth Circuit. This will further reinforce and enhance the Ninth Circuit's judicial arrogation of power to the detriment of the State of California, which will therefore be robbed of the opportunity to clarify its own law of negligence and nuisance. "Competent plaintiffs' lawyers will surely file their actions in federal district courts, citing diversity for jurisdiction and demanding that the district courts follow the Ninth Circuit's interpretation of California law." (App. C at 124a (Callahan J., dissenting).) As such, review by this Court is necessary to

9. *But see White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 820 (N.D. Ohio 2000) (contradicting the state court's prior ruling, imposing liability on gun manufacturers in spite of the tort's interference with legislative function, stating that "[t]he Court does not dismiss cases based on public policy").

10. "How many other manufacturers or distributors of products that find their way into California will be burdened with similar allegations?" (App. C at 115a (Callahan, J. dissenting).)

forestall such forum shopping and to ensure that the California Supreme Court is "given an opportunity to correct the [Ninth Circuit's] interpretation of California law." *Id.*

III. A COMMON LAW TORT DUTY RESTRICTING LAWFUL COMMERCE IN FIREARMS VIOLATES THE COMMERCE CLAUSE

A. The Regulatory Effects of This Tort Are Direct and Produce Sweeping Extraterritorial Effects.

The Ninth Circuit also erred in holding that the Commerce Clause does not bar this suit. First, the Ninth Circuit's suggestion that Respondents' abandonment of claims for injunctive relief and punitive damages somehow "saves" the claim from Commerce Clause attack on the grounds that compensatory damages are not "regulatory" is incorrect. (*See* App. A at 54a-55a.) In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), this Court clearly ruled that "[t]he obligation to pay *compensation* can be, indeed is designed to be, a potent method of governing conduct and controlling policy." (emphasis added)). As such, compensatory damages may have a direct regulatory effect to the same extent as do punitive damages, particularly where, as here, the result is a state's acquisition of power or supervision over the internal affairs of another State. *Cf. BMW of N. Am.*, 517 U.S. at 572 n.17; *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003).

Second, the Ninth Circuit erred by blithely brushing aside the defendants' Commerce Clause arguments, reasoning that the tort's regulatory effects were only indirect. (App. A at 55a.) In fact, this tort imposes a very direct restraint on interstate commerce. *See Edgar v. Mite Corp.*, 457 U.S.

624, 641-42 (1982) (stating that a regulation can be said to have an "indirect" effect on interstate commerce only where it applies to activity taking place *within* the state). Here, the tort attempts to regulate marketing and distribution activities potentially occurring wholly outside the state of California. *Id.* Indeed, Petitioner is headquartered in Beijing, PRC, and no facts have been alleged showing any connection between Petitioner and the State of California.

Third, the tort violates the Commerce Clause by virtue of its "sweeping extraterritorial effect" in that it purports to regulate marketing and distribution activities not involving a single California resident. *See id.* at 642. As such, the Ninth Circuit's great reliance on the non-discriminatory nature of the tort was inapposite. When a state regulation produces a direct effect on interstate commerce, it is barred, regardless of whether its purpose was otherwise proper. *Id.*

B. The Ninth Circuit's Dormant Commerce Clause Analysis Was Erroneous.

Furthermore, the Ninth Circuit's Dormant Commerce Clause analysis incorrectly assumed that Congress has not yet spoken on the issue of the uniform regulation of trade in firearms. This is simply not the case.[11]

---

11. Where a state law is in conflict with positive federal law enacted under the commerce power, or where it otherwise "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the state law "*must yield.*" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., concurring in part) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down a state law that interfered with the objectives of a federal statute).

The National Gun Control Act of 1968, enacted under Congress' commerce power, was intended to provide a uniform structure for the regulation of all trade in firearms affecting interstate commerce. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 120 (1983) (stating that "[t]he legislative history reveals that Congress believed a uniform national program was necessary to assist in curbing the illegal use of firearms" (citing S. Rep. No. 1097, 90th Cong., 2d Sess., 28, 76-77 (1968))). Courts, whether state or federal, may not frustrate that goal of uniformity by imposing laws that conflict with or otherwise serve as an impediment to the Act. *Caron v. United States*, 524 U.S. 308, 316 (1998).

Here, this tort cause of action directly conflicts with the Act by imposing a regulatory scheme in opposition to its underlying goals and purposes. First, by purporting to impose a duty on firearms manufacturers to refrain from oversupplying the market for firearms, the tort impermissibly attempts to place a restraint on lawful commerce in firearms worldwide although Congress clearly intended that the Act not restrict lawful trade in firearms. *See* Firearms Owners' Protection Act, Pub. L. 99-308, § 1(b), 100 Stat. 449 (1986): "[T]his title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes. . . ."

Here, the tort attempts to place a damper on *all* trade in firearms. By restraining lawful as well as unlawful trade, the tort is "at odds with achievement of the federal decision about the right degree of pressure to employ." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) (citation omitted) (footnote omitted). The dissimilar calibration of the restraint on commerce in firearms is therefore fatal to the state law. *Id.*

Second, contrary the Act's goal of uniformity, the Ninth Circuit's form of regulation by tort occurs in a non-uniform and piecemeal manner. Contrary to the Ninth Circuit's assertion that the tort "regulates evenhandedly," (App A at 54a), although the firearms industry *as a whole* may have breached its duty by "producing, marketing, distributing and selling substantially more firearms than they should reasonably expect to be bought by law-abiding purchasers," liability only attaches to such individual industry participant whose product happened to be fired. (*See* App. A at 52a ("[A] claim for nuisance and negligence cannot stand where the weapons were not actually fired.").) In the last analysis, therefore, it is a random, unforeseeable act of a murderer that determines the manufacturer's liability for negligence, *not the conduct of the manufacturer*. As such, the Ninth Circuit's decision produces an extremely "blunt and capricious method of regulation" that is inefficient, ineffective, and producing "results highly unpredictable in probability and magnitude." (App. C at 129a (Kozinski, J., dissenting).)

Finally, this common law tort duty conflicts with the federal scheme by attempting to modify the agents of enforcement. Although the tort purports to impose a duty on firearms manufacturers to keep firearms out of the hands of criminals by both restricting public access to firearms and by monitoring the dealers, Congress has already assigned comprehensive, nationally uniform responsibility for this role to the Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms. *Huddleston v. United States*, 415 U.S. 814 (1974):

> The principal purpose of the federal gun control legislation, therefore, was to curb crime by

> *keeping "firearms out of the hands of those not legally entitled to possess them* because of age, criminal background, or incompetency."
>
> Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968 are thus aimed at *restricting public access to firearms*. Commerce in firearms is channeled through federally licensed importers, manufacturers, and dealers in an attempt to halt mail-order and interstate consumer traffic in these weapons. *The principal agent of federal enforcement is the dealer. He is licensed, §§ 922 (a)(1) and 923 (a); he is required to keep records of "sale . . . or other disposition," § 923 (g); and he is subject to a criminal penalty for disposing of a weapon contrary to the provisions of the Act, § 924.*

Id. at 824 (quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968) (emphasis added)).

It is not for the Ninth Circuit arbitrarily to impose a state tort law duty on firearms manufacturers, requiring them to act as agents of enforcement concerning the sale and distribution of firearms nationwide. Congress alone has the power to regulate interstate commerce in firearms. Furthermore, Congress has already enacted a comprehensive regulatory regime concerning the interstate sale and distribution of firearms, expressly appointing the federally licensed dealer as its agent of enforcement—not the manufacturers, marketers, or distributors of firearms.

IV. THIS ISSUE IS ONE OF GREAT IMPORTANCE, TRANSCENDING THE DISPUTE BETWEEN THE PARTIES TO THIS ACTION

The imposition of a duty on gun manufacturers to refrain from distributing their products where such sale and distribution is otherwise lawful is an issue of great national importance, due to its far reaching and unnecessarily deleterious impact on commerce and international comity.

A. The Tort Will Significantly Disrupt Economic Activity.

This tort contains at its core a restraint on trade, in that it imposes a duty not to oversupply a market. However, unlike restraints on trade enacted under legislative authority, this restraint will create a chaotic maze of conflicting laws with uncertain standards of liability, greatly raising the risk to manufacturers of products and, accordingly, raising the cost of manufacture, sale or distribution of those products. As Judge Kozinski noted in his dissent: "Imposing novel tort theories on economic activity significantly affects the risks of engaging in that activity, and thus alters the cost and availability of the activity within the forum jurisdiction." (App. C at 129a (Kozinski, J. dissenting).)

The economic impact of this novel tort is not limited to the firearms industry, for many other products are equally amenable to such theories of harmful oversupply. For example, sports cars may become an instrument of harm to innocent persons when utilized in an unlawful manner. However, it is beyond the pale to suggest that General Motors has a duty in tort to limit its advertising and production of Corvettes so as to improve the statistical odds that an unsafe

driver will not obtain the car. Nor does tort law otherwise impose a duty on General Motors to require its dealers to sell the Corvettes only to customers with a certain safety profile. (*See* App. C at 115a (Callahan, J. dissenting).)

To import such a risk-spreading device into the law of negligence from strict products liability law, regardless of the fact that the manufacturer has no possible way of removing the so called "defect" from the chain of distribution (other than not to sell the product at all), essentially imposes a penalty so as to discourage the commercial activity itself. "This is not California law." (App. C at 116a (Callahan, J., dissenting).) Furthermore, any change in the law to this effect is a policy decision that must be made through the democratic process, not by unelected federal judges sitting in diversity.

B. The Decision Below Will Disrupt International Comity.

The Ninth Circuit's broadening of state tort law causation to accommodate its broad theory of liability threatens to impede international comity and commerce. At its core, Respondents' theory of liability is founded on allegations of an attenuated chain of events beginning with the Petitioner's alleged manufacture of a product in the PRC and ending (after passing through untold numbers of unknown intermediaries' hands) with a random criminal act of an unrelated third party in the United States.

If the rule below is permitted to stand, liability may therefore be imposed on a wide range of commercial activities occurring on foreign soil previously immune from suit. Such uncertainty and unbounded liability is certain to significantly impair commerce with our international trading partners, such as the Petitioner here. Furthermore, the

imposition of tort liability for commercial acts taking place outside of the United States under such an expansive definition of causation represents an unprecedented assertion of extraterritorial power by the United States over foreign commercial activities, certain to impair international comity.

CONCLUSION

In sum, the federal judiciary may not arrogate the police power of the legislature of the State of California to itself by judicial fiat. To permit the exercise of such judicial activism is to abrogate the commands of the Tenth Amendment and to tacitly approve a gradual destabilization of the balance of powers under our federalism.

For the foregoing reasons, the Petitioner respectfully requests that the honorable members of this Court grant its Petition for a writ of certiorari.

Respectfully submitted,

CHARLES H. DICK, JR.*
COLIN H. MURRAY
BAKER & MCKENZIE LLP
101 West Broadway
12th Floor
San Diego, CA 92101
(619) 236-1441

MICHAEL A. POLLARD
BAKER & MCKENZIE LLP
130 East Randolph Drive
Chicago, IL 60601

* *Counsel of Record*

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 20, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-56197

D.C. No.
CV-01-09762-ABC

LILIAN S. ILETO, an individual and mother to Joseph S. Ileto, deceased; JOSHUA STEPAKOFF, a minor, by his parents Loren Lieb and ALAN B. STEPAKOFF; MINDY GALE FINKELSTEIN, a minor, by her parents David and Donna Finkelstein; BENJAMIN KADISH, a minor by his parents Eleanor and Charles Kadish; NATHAN LAWRENCE POWERS, a minor by his parents Gail and John Michael Powers, for himself and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

GLOCK INC., a Georgia Corporation; CHINA NORTH INDUSTRIES CORP., a Chinese entity aka Norinco; Davis Industries, a California Corporation; REPUBLIC ARMS INC., a California Corporation; JIMMY L. DAVIS, an individual; BUSHMASTER FIREARMS, a Maine Corporation; RSR MANAGEMENT CORPORATION; RSR WHOLESALE GUNS SEATTLE INC.,

Defendants-Appellees,

Appendix A

and

MAADI, an Egyptian business entity; IMBEL, a Brazilian business entity; THE LOANER PAWNSHOP TOO, a Washington Corporation; David McGee, an individual; GLOCK GMBH, an Austrian business entity,

Defendant.

OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted June 3, 2003

Before Cynthia Holcomb Hall, Sidney R. Thomas, and
Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Hall

OPINION

PAEZ, Circuit Judge.

On August 10, 1999, Buford Furrow ("Furrow") shot and injured three young children, one teenager, and one adult at the Jewish Community Center ("JCC") in Granada Hills, California. Furrow fled the JCC with his weapons and, later that day, shot and killed Joseph Ileto ("Ileto"), a United States

Postal worker who was delivering mail in Chatsworth, California.

Ileto's sole surviving dependent parent and three of the children who were shot at the JCC filed a complaint in the Los Angeles Superior Court against multiple defendants involved in the manufacture, marketing, and distribution of various firearms found in Furrow's possession. The case was removed to federal district court, where the plaintiffs asserted negligence and public nuisance claims against several gun manufacturers, distributors, and dealers. These defendants filed motions to dismiss under Fed.R.Civ.P. 12(b)(6), and all motions were granted. Plaintiffs appeal the dismissal of their public nuisance and state law negligence claims.[1]

Because the plaintiffs have stated a cognizable claim under California tort law for negligence and public nuisance against the manufacturers and distributor of the guns used in the shootings, we reverse the district court's dismissal against the plaintiffs and in favor of defendants Glock, Inc., China North Industries Corp., RSR Management Corp. and RSR Wholesale Guns Seattle Inc. We affirm the district court's dismissal in favor of all other defendants.[2]

---

1. When we refer to "plaintiffs," we include Benjamin Kadish, Joshua Stepakoff, Mindy Finkelstein, Nathan Powers, and Lilian Ileto. Lilian Ileto, Joseph Ileto's mother, also asserted survival and wrongful death claims. As we explain below, because those claims incorporate the negligence and nuisance claims, the analysis with respect to these claims applies to Lilian Ileto's survival and wrongful death claims.

2. Defendants Maadi, an Egyptian business, and Imbel, a Brazilian business, never appeared in the district court. The district

(Cont'd)

Appendix A

I. Facts And Procedural Background[3]

On August 10, 1999, Furrow approached the North Valley JCC in Granada Hills, California, carrying firearms manufactured, marketed, imported, distributed, and/or sold by the defendants named in this case. When Furrow purchased these guns and at the time of the shooting, federal law prohibited him from possessing, purchasing, or using any firearm.[4] Furrow allegedly had at least the following guns

(Cont'd)
court docket does not reflect that these defendants were served with the summons and complaint in this action. These defendants therefore are not parties to this appeal.

3. Because the district court dismissed the plaintiffs' case pursuant to Rule 12(b)(6) dismissal for failure to state a claim, we must "accept as true all well-pleaded allegations of fact in the complaint and construe them in the light most favorable to the plaintiffs." Thus, this factual recitation is taken from the plaintiffs' First Amended Complaint ("FAC").

4. Furrow had been committed to a psychiatric hospital in 1998, indicted for a felony in 1998, and convicted of assault in the second degree in 1999 in the state of Washington. Federal law prohibits a person with a mental defect who has been committed to a mental institution and/or convicted of a felony from purchasing a gun. This prohibition is contained in 18 U.S.C. § 922(d), which provides in pertinent part:

> It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(Cont'd)

in his possession: Glock Inc's ("Glock's") model 26, a 9mm handgun; China North Industries Corp's ("Norinco's") model 320, a 9mm short-barreled rifle; Maadi's model RML, a 7.62 caliber automatic rifle; Bushmaster's model XM15 E25, a .223 caliber rifle; two of Imbel's model L1A1, a .308 caliber rifle; and Davis Industries' model D 22, a .22 caliber handgun.

Furrow entered the JCC with this arsenal and proceeded to shoot and injure three young children, one teenager, and one adult with his Glock gun. Two of the young children were plaintiffs Joshua Stepakoff ("Stepakoff"), who was six years old at the time of the shooting, and Benjamin Kadish ("Kadish"), who was five years old at the time of the shooting. Stepakoff was shot twice in the left lower leg and left hip, fracturing a bone. Kadish was shot twice in the buttocks and left leg, fracturing his left femur, severing an artery, and causing major internal injuries. Plaintiff Mindy Finkelstein ("Finkelstein"), a sixteen-year old camp counselor, was shot twice in her right leg. Plaintiff Nathan Powers ("Powers"), a

---

(Cont'd)

> (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) is a fugitive from justice;
>
> (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
>
> (4) has been adjudicated as a mental defective or has been committed to any mental institution . . .

four year-old boy, was not shot, but witnessed and experienced the shootings. The shootings terrified and shocked him, causing him to suffer great mental suffering, anguish, and anxiety as well as severe shock to his nervous system. He suffered severe emotional distress as a result.

Furrow then fled the JCC with the firearms, and came upon Ileto, a United States Postal Service worker, who was delivering mail in Chatsworth, California. Furrow shot and killed Ileto with his Norinco gun. Nine millimeter bullet casings were recovered at both crime scenes. The Norinco and the Glock guns in Furrow's possession were chambered for 9mm ammunition.[5]

In their initial complaint, the plaintiffs alleged five causes of action. Lilian Ileto also asserted two claims against all defendants for survival and wrongful death. The last five claims were brought by all plaintiffs against all defendants[6] for public nuisance, negligence, negligent entrustment, and unfair business practices. The original complaint sought certification of a class, damages, and injunctive relief.

On May 23, 2001, the plaintiffs filed their thirty-seven page FAC, retaining Lilian Ileto's survival and wrongful death claims as well as all plaintiffs' negligence and public nuisance claims, and the claim for damages. Plaintiffs abandoned their

5. The FAC states that the Norinco, the Glock, and the Davis guns were chambered with 9mm casings. However, in an errata filed after the FAC, plaintiffs noted that only the Glock and the Norinco guns actually were chambered for 9mm ammunition.

6. Two defendants, Loaner Pawnshop and David McGee, successfully moved for dismissal for lack of personal jurisdiction.

class allegations and their requests for injunctive relief, and dropped defendants Loaner Pawnshop and David McGee from the complaint. RSR Management Corporation and RSR Wholesale Guns Seattle, Inc. (collectively, "RSR") were named as two of the Doe defendants. Norinco removed the action to federal court pursuant to 28 U.S.C. §§ 1330 and 1603 on the ground that Norinco is an instrumentality of a foreign state.

In the FAC, plaintiffs asserted a number of claims against the manufacturers, distributors, and dealers of the guns Furrow carried with him on the day of the shootings. Defendants moved to dismiss the case, arguing that even if all of the alleged facts were true, the plaintiffs had failed to state a legally cognizable claim; the district court agreed and granted the motions to dismiss. On appeal, the plaintiffs pursue only two of their original claims, the negligence and public nuisance claims. Below, we set forth the core allegations with respect to these claims.

A. Facts Alleged in the Negligence Claim

The first three claims in Count IV include general claims against all defendants, alleging that their "deliberate and reckless marketing strategies caused their firearms to be distributed and obtained by Furrow resulting in injury and death to plaintiffs." Plaintiffs also allege that the defendants intentionally produced more firearms than the legitimate market demands with the intent of marketing their firearms to illegal purchasers who buy guns on the secondary market. The plaintiffs also allege that the defendants breached their legal duty to the plaintiffs "through their knowing,

intentional, reckless, and negligent conduct . . . foreseeably and proximately causing] injury, emotional distress, and death to plaintiffs."

Plaintiffs allege that each of the firearms used by Furrow (the one allegedly used at the JCC, the one used to kill Ileto, and the ones not necessarily fired but carried by Furrow in his arsenal on the day of the shootings)

> were marketed, distributed, imported, promoted, or sold by each of the defendants in the high-risk, crime-facilitating manner and circumstances described herein, including gun shows, 'kitchen table' dealers, pawn shops, multiple sales, straw purchases, faux 'collectors,' and distributors, dealers and purchasers whose ATF crime-trace records or other information defendants knew or should have known identify them as high-risk. Defendants' practices knowingly facilitate easy access to their deadly products by people like Furrow.

With respect to Glock, plaintiffs specifically alleged that Glock targets its firearms to law enforcement first to gain credibility and then uses the enhanced value that comes with law enforcement use to increase gun sales in the civilian market. They contend that Glock guns are safe and appropriate for use by well trained elite offensive police forces, but are not appropriate for civilians or unskilled users. In addition, Glock and its distributors encourage police departments to make trade-ins earlier than necessary or originally planned so that they can sell more firearms to the

police and sell the former police guns at a mark-up on the civilian market. Glock knows that by over-saturating the market with guns, the guns will go to the secondary markets that serve illegal purchasers.

The gun that Furrow used to shoot and kill Ileto was purchased originally by a police department in the state of Washington. The plaintiffs allege that Glock and its distributor, RSR Seattle, arranged for the sale of the gun to the police department and its subsequent sale to gun dealers to facilitate the creation of an illegal secondary gun market. The gun was initially shipped to the Cosmopolis Police Department in Washington State along with another gun of the same model. Within one week, the police department determined that the guns were too small to fit into a large person's hand and decided to exchange the guns for another Glock model. The Cosmopolis Police Department contacted a former Police reserve officer, Don Dineen ("Dineen"), who had a gun store in Cosmopolis, to complete the exchange. Dineen contacted RSR Seattle, a Glock distributor, to request two new Glock guns for a trade with the Cosmopolis Police Department. RSR shipped the two guns to Dineen and agreed that payment did not have to be made for the new guns until Dineen was able to sell the former police guns. In a transaction with the police department, Dineen exchanged the two new Glock guns for the two Glock guns rejected by the Department at no cost to the Department. Dineen then was able to sell one of the former Police Department Glock guns at a reduced price to David Wright, a man who claimed to be a gun collector.

Dineen had introduced Wright to another "gun collector"[7] named Andrew Palmer, knowing that neither Wright nor Palmer had firearms licenses, and therefore that they did not have to obtain background checks on their purchasers. Dineen also knew that Wright and Palmer frequently sold and traded guns at gun shows in Spokane, Washington, which is near Hayden Lake, Idaho, the home of the Aryan Nations and the Neo Nazi group of which Furrow was a member. Indeed, Wright sold the Glock gun to Palmer at a gun show in Spokane, Washington; at this same gun show, it is alleged that Furrow purchased the Glock gun used in the JCC shootings from Palmer.

Plaintiffs alleged that all the defendant gun manufacturers and distributors produce, distribute, and sell more firearms than legal purchasers can buy, and that they all "knowingly participate in and facilitate the secondary market where persons who are illegal purchasers and have injurious intent obtain their firearms." Furthermore, the plaintiffs allege that the defendant manufacturers and distributors "select and develop distribution channels they know regularly provide guns to criminals and underage end users. Defendant manufacturers and distributors have been specifically so informed [by the ATF[8]] in connection with

7. The Complaint alleges that these "gun collectors" do not actually collect guns for any purpose other than to sell them without having to comply with the firearm registration system and background checks with which gun store owners must comply with when they sell a gun.

8. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is a law enforcement agency within the United States Department of Justice.

[its] crime-gun trac[ing] efforts[.]" Despite this knowledge and information documenting the path of guns to illegal purchasers, the defendant manufacturers and distributors fail to exercise reasonable care to protect the public from the risks created by the distribution and marketing schemes that create an illegal secondary market. Defendants' contracts with their distributors and dealers, and the defendant distributors' contracts with their dealers do not include provisions to address the risks associated with prohibited purchasers. Defendants gain significant revenue from the illegal secondary gun market and therefore fail to adopt the most basic policies and practices that would help to decrease greatly the number of guns reaching prohibited purchasers.

Plaintiffs further alleged that the defendants create and control the distribution channels that provided Furrow, an illegal purchaser and user, with the firearms he used to kill Ileto and to injure the other victims. Defendants knew which distributors and dealers provided guns to illegal purchasers. Defendants knew that their negligent conduct created an unreasonable risk of harm to people like the plaintiffs and that the subsequent creation of an illegal secondary gun markets was a substantial factor contributing to the injuries the plaintiffs suffered. Finally, plaintiffs alleged damages for "numerous compensable injuries suffered by plaintiffs[that] include but are not limited to personal injury, death, pain and suffering, severe emotional distress, lost companionship, medical expenses, and lost income."

Appendix A

B. FACTS ALLEGED IN THE NUISANCE CLAIM

Plaintiffs also allege that the defendants' marketing and distribution policies "knowingly created and maintained an unreasonable interference with rights common to the general public, constituting a public nuisance under California law." Plaintiffs allege that defendants

> market, distribute, promote, and sell firearms, a lethal product, with reckless disregard for human life and for the peace, tranquility, and economic well being of the public. They have knowingly created, facilitated, and maintained an over-saturated firearms market that makes firearms easily available to anyone intent on crime. The particular firearms used in these incidents were marketed, distributed, imported, promoted, and sold by defendants in the manner set out herein, which defendants knew or should have known facilitates and encourages easy access by persons intent on murder, mayhem, or other crimes, including illegal purchasers such as Furrow. Their conduct has thereby created and contributed to a public nuisance by unreasonably interfering with public safety and health and undermining California's gun laws, and it has resulted in the specific and particularized injuries suffered by plaintiffs.

Although defendants knew about precautions they could have taken to decrease access by prohibited purchasers of their products, they "knowingly establish[ed], suppl[ied], and

maintain[ed] an over-saturated firearms market that facilitates easy access for criminal purposes, including access by persons prohibited to purchase or possess firearms under state or federal law." Defendants' actions make the public vulnerable to crime and assault and their conduct "obstructs the free passage or use . . . of the public parks, squares, streets, and highways within the meaning of California Penal Code § 370." As alleged in the FAC, the defendants' interference with rights common to the public is unreasonable and constitutes a nuisance because:

> It significantly interferes with the public safety, health or peace. This interference is not insubstantial or fleeting, but rather involves a disruption of public peace and order in that it adversely affects the fabric and viability of the entire community, and a substantial number of persons, within the meaning of California Civil Code § 3480. . . .
>
> It is continuing conduct, and it has produced a permanent or long-lasting effect, and defendants know or have reason to know that it has a significant effect upon the public right. Defendants continually engage in their reckless conduct even though they are continually informed of the resulting substantial, permanent, and long-lasting harm and even as they receive daily notice from the ATF of the distribution channels they use that are doing the most harm. Defendants have reason to know-and actually know [—] of the disastrous, continuing, and

> long-lasting effects of their conduct on the public. . . .
>
> Though not necessarily proscribed per se by law, defendants' conduct nevertheless undermines state and federal law restricting gun sales and possession and renders enforcement of such laws difficult or impossible. In this sense, defendants' interference with a common public right is contrary to public policy as established by state and federal law, and the interference is therefore unreasonable.

Plaintiffs seek damages for injuries they suffered as a result of defendants' creation of a public nuisance.

C. District Court Dismissal and Plaintiffs' Claims of Negligence and Public Nuisance

Defendants Republic Arms, Inc., Jimmy L. Davis and Davis Industries (collectively, "Davis"), Quality Parts Company and Bushmaster Firearms ("Bushmaster"), RSR, Norinco, and Glock all filed motions to dismiss under Fed.R.Civ.P. 12(b)(6). In a published memorandum order, the district court granted the motions to dismiss. *See Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040 (C.D.Cal.2002). The district court directed entry of a final judgment in favor of all moving defendants pursuant to Fed.R.Civ.P. 54(b).

On appeal, plaintiffs maintain that on the basis of the allegations stated in the FAC, they have demonstrated that all defendants, including those who manufactured and

distributed the guns that Furrow fired and the guns that he carried in his arsenal during the shootings, created a secondary market targeting illegal purchasers and promoted their products as necessary for self protection. Plaintiffs argue that defendants failed to take even minimal precautions to prevent or diminish the criminal market.[9] Plaintiffs argue that defendants created this illegal secondary market and promoted it despite the knowledge that as a result of this distribution scheme, it was reasonably foreseeable that individuals like the plaintiffs here and the public at large would be harmed. As we discuss below, taking the allegations in the FAC as true for purposes of review of a Rule 12(b)(6) dismissal, we conclude that the plaintiffs sufficiently have alleged claims for relief for negligence and public nuisance.

II. Standard of Review

We review *de novo* a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Kirtley v. Rainey,* 326 F.3d 1088, 1092 (9th Cir.2003). Rule 12(b)(6), which tests the legal sufficiency of the claims asserted in the complaint, must be read in conjunction with Rule 8, which requires a "short and plain statement showing that the pleader is entitled to relief" and "contains a powerful presumption against rejecting pleadings for failure to state a claim." *Gilligan v. Jamco Dev. Corp.,* 108 F.3d 246, 248-49 (9th Cir.1997) (internal citation omitted). We must take 'all well-pleaded allegations of material fact as true and construe

9. It should be noted that plaintiffs do not allege that the creation of *any* secondary market is a criminal market-only those markets that sell to prohibited purchasers, like Furrow, are alleged to be criminal secondary markets.

them in the light most favorable to the plaintiff." *Desaigoudar v. Meyercord,* 223 F.3d 1020, 1021 (9th Cir.2000).

We also must consider all inferences favoring the non-moving party that a trier of fact could reasonably draw from the evidence. *See Zimmerman v. City of Oakland,* 255 F.3d 734, 737 (9th Cir.2001). However, we do not accept any unreasonable inferences or assume the truth of legal conclusions cast in the form of factual allegations. *See Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir.1981).[10] Because we are sitting in diversity, and there are no supreme court or appellate court decisions in California that have addressed the specific claims alleged by the plaintiffs, we must attempt to determine how the California Supreme Court might decide the issue. *DeSoto v. Yellow Freight Sys., Inc.,* 957 F.2d 655, 658 (9th Cir.1992).

III. Analysis: General Allegations Against Defendants

In *Merrill v. Navegar,* the California Supreme Court rejected a negligent design claim in the context of a product liabilities action, but the court never has addressed a negligent distribution or marketing claim. 28 P.3d 116 (2001).[11] When

10. We note that these allegations are similar to allegations in other cases where other state courts and a federal district court have denied motions to dismiss. See discussion, *infra* at 16462-63, 16476. We conclude as these other courts do that the facts as alleged do not require any unreasonable inferences and therefore accept them as true on review of the district court's dismissal of these claims.

11. In *Merrill,* the California Supreme Court held that, although the plaintiffs characterized their action as a negligence claim, it was

(Cont'd)

the district court in the present case dismissed the negligence claim, it concluded that the claims before it were distinguishable from the design claims in *Merrill.* We agree that these claims are distinct from the ones raised in *Merrill.* Although *Merrill* involved allegations of negligence in gun marketing, selling, and manufacturing, "[t]he Merrill plaintiffs alleged that the defendant was negligent in 'releasing the weapons for sale to the general public even though it knew or should have known that the TEC 9 was particularly attractive to criminals and particularly suited for mass killings.'" *Ileto,* 194 F. Supp. 2d at 1051 (quoting *Merrill,* 28 P.3d at 121). As the district court noted, in *Merrill,* "even the negligent sale claim was based on the dangerous design of the particular firearm at issue. Additionally, the *Merrill* plaintiffs claimed that the defendant was negligent

---

(Cont'd)
in reality a products liability action and therefore barred by then-existing California Civil Code section 1714.4, which barred gun manufacturers from liability in a products liability action. *Merrill,* 28 P.3d at 119. Thus, although the *Merrill* plaintiffs presented a negligent marketing claim, that claim, like the others, was actually a part of the plaintiffs' underlying defective design claim and was therefore dismissed. Plaintiffs alleged the marketing was negligent because it was marketing a defective product. The *Merrill* court noted that the plaintiffs themselves acknowledged that the marketing claim was "immaterial" to causation. According to the *Merrill* court, the plaintiffs argued: "[T]he ordinary negligence claim is directed to Navegar's conduct in making the TEC 9 available to the public. It is that unreasonable conduct that was a substantial factor in causing plaintiffs' injuries, not Navegar's marketing efforts." Id. at 122. Thus, contrary to the dissent's conclusion with respect to the marketing claim in *Merrill,* the California Supreme Court has yet to address the type of negligent distribution claim presented here.

in selling the firearm generally, rather than through crime-prone distribution channels." *Id.*

The California Supreme Court concluded in no uncertain terms that the *Merrill* plaintiffs presented a negligent products liability action, and that the plaintiffs' attempts to disguise their products liability claim by avoiding the use of the word "defect" was an unsuccessful attempt to mischaracterize the true nature of the suit. *Merrill,* 28 P.3d at 126. In *Merrill,* distribution claims did not stand alone; references to "distribution" were to distribution of a defective product. Here, as the district court emphasized, "Plaintiffs . . . do not allege that Glock is negligent in distributing its firearms to the general public. Rather, they contend that Glock's distribution scheme specifically targets criminal users." *Ileto,* 194 F. Supp. 2d at 1051. Unlike the *Merrill* plaintiffs, who alleged that the gun manufacturers' decision to distribute the guns in question to the general public was negligent in light of the guns' alleged defective design features and therefore was "simply a reformulated claim that the weapon, as designed, fails the risk/ benefit [products liability] test," *Merrill,* 28 P.3d at 126, here plaintiffs focus on the negligent distribution of a non-defective product. The focus is on the defendants' affirmative actions in distributing their products to create an illegal secondary market for guns that targets illegal purchasers.

Contrary to the dissent's mis-characterization of this case as a products liability suit, this is an action that alleges negligence and public nuisance claims; it does not allege that the guns in question were defectively designed or manufactured or that the defendants failed to affix an

adequate warning on the guns. *See Barker v. Lull Eng'g Co.* 20 Cal.3d 413, 428 (1978) (citing the "numerous product liability precedents in California" that describe three basic categories of cases: manufacturing defects, design defects, and inadequate warnings). Thus, the dissent's reliance on *Stevens v. Parke, Davis, & Co.*, 9 Cal.3d 51 (1973), a case in which the California Supreme Court upheld a jury's verdict finding that the drug manufacturer "was negligent in that it failed to provide an adequate warning to the medical profession as to the dangers of [the drug in question] and it so overpromoted [the drug] as to cause [the deceased's doctor] to prescribe the drug," *Id.* at 64, to demonstrate that California courts would treat the current action as a products liability action is misplaced. The over-promotion claim in *Stevens* was dependent on the underlying traditional products liability claim of inadequate warnings. "Although the manufacturer or supplier of a prescription drug has a duty to adequately warn the medical profession of its dangerous properties or of facts which make it likely to be dangerous, an adequate warning to the profession may be eroded or even nullified by overpromotion of the drug through a vigorous sales program which may have the effect of persuading the prescribing doctor to disregard the warnings given." *Id.* at 65.

In the present case, there is no such underlying products liability issue—the plaintiffs acknowledge that the products were not defective and that they did not lack necessary warnings. Rather, plaintiffs allege that through their distribution scheme, defendants created an illegal secondary market for guns targeted at illegal users. Thus, the California Supreme Court's citation in *Stevens* to the Restatement

(Second) of Torts § 388, which, as the dissent acknowledges, is a section of the Restatement that addresses a theory of products liability on the basis of failure to warn, provides no indication that in light of plaintiffs' allegations, the California Supreme Court would treat plaintiffs' negligent distribution claim as one for products liability.

We also conclude that there was no statutory bar to a negligent distribution or nuisance claim at the time the case was filed (nor is there a bar today). Until January 2003, California Civil Code section 1714.4 read as follows:

> (a) *In a products liability action,* no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.
>
> (b) *For purposes of this section:*
>
> (1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.
>
> (2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are

> proximately caused by the actual discharge of the product.

Cal. Civ.Code section 1714.4 (repealed in 2002) (emphasis added)[12]

As the district court noted, "section 1714.4 does not by its terms bar the negligence action." *Ileto,* 194 F. Supp. 2d at 1050. Indeed, the text of the section is carefully limited to products liability actions. As explained above, unlike *Merrill,* this case is not a products liability case re-framed as a negligence case, but rather it is a classic negligence and nuisance case. Thus, although section 1714.4 was in force at the time of the shootings and at the time that the complaint was filed, it did not affect this action.[13]

---

12. The California legislature repealed section 1714.4 shortly after the California Supreme Court issued its decision in *Merrill v. Navegar.* According to many commentators, the California legislature's repeal of section 1714.4 was in direct response to the *Merrill* decision. *See* Emily Kromke, Note, *California's Legislative Response to Merrill v. Navegar:* An Analysis, 24 Whittier L.Rev. 833, 834 (2003) ("The *Merrill* court was unable to find gun manufacturers liable . . . due to California Civil Code section 1714.4. As a result, the California legislature decided to change the law to allow gun and ammunition manufacturers to be sued on product defect actions as well as negligence actions.").

13. The dissent cites California Civil Code section 1714.4(b) to support its argument that "California law unequivocally states that the injuries and damages here were proximately caused by Buford Furrow." This conclusion only follows, as the dissent acknowledges, "[o]nce . . . section 1714.4 [applies]." As we explained and as the district court concluded, plaintiffs' claim does not fall under this (Cont'd)

Appendix A

In order to determine the existence and scope of duty, "we begin always with the command of . . . section 1714, subdivision (a): 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . .'"[14] *Merrill*, 28 P.3d at 123 (quoting *Christensen v. Superior Court*, 820 P.2d 181, 189 (Cal.1991)). In *Rowland v. Christian*, the California Supreme Court explained that

> [a] departure from this fundamental principle involves the balancing of a number of considerations, the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct,

---

(Cont'd)
section because it is not premised on a theory of products liability. Rather, here plaintiffs contend that the defendants' actions in the creation of an illegal secondary market targeting prohibited purchasers were negligent and constituted a public nuisance—plaintiffs never alleged that the guns in Furrow's possession were defective. Plaintiffs' allegations focus on defendants' distribution scheme.

14. The repeal of section 1714.4 coincided in 2002 with the amendment of section 1714, when the California legislature added the following text to section 1714(a): "The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section . . ."

> the policy of preventing future harm, and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

443 P.2d 561, 564 (1968) (superseded by statute as stated in *Perez v. S. Pac. Transp. Co.*, 218 Cal.App.3d 462, 467, 267 Cal.Rptr. 100 (1990)). *See also Merrill,* 28 P.3d at 124 (restating the same criteria for exceptions from the rule set forth in section 1714).

Defendants argue that an application of these criteria—especially the connection between the defendants' conduct and the injury suffered—results in the conclusion that no duty arises. However, as explained below, the plaintiffs sufficiently have alleged that it was reasonably foreseeable that defendants' actions were likely to result in the kind of harm experienced by the plaintiffs. Furthermore, plaintiffs have alleged with specificity the link between the manufacturers' and distributors' negligent behavior and the harm suffered. Because several of the defendants are situated differently, we address separately the claims against each individual defendant. However, where all defendants make the same argument, we refer to them collectively as defendants' arguments. Similarly, where the plaintiffs make allegations that apply to all defendants we refer to allegations against "defendants," including Glock and the other individual defendants. We begin with Glock, and then analyze the claims against Norinco, RSR, Bushmaster, and Davis.

Appendix A

A. Plaintiffs State a Claim for Negligence

In order to establish negligence under California law, a plaintiff must establish four required elements: (1) duty; (2) breach; (3) causation; and (4) damages. *See Martinez v. Pacific Bell,* 275 Cal.Rptr. 878, 883 (1990); *see also* 6 Witkin, Summary of Cal. Law, Torts § 732, at 60-61 (9th ed.1988).

1. Glock Owes Plaintiffs a Duty of Care

Whether a legal duty arises "is a question of law which is simply an expression of the sum total of the policy considerations that lead a court to conclude that a particular plaintiff is entitled to protection." *Jacoves v. United Merchandising Corp.,* 11 Cal.Rptr.2d 468, 484 (1992); *see also Ballard v. Uribe,* 715 P.2d 624, 629 n. 9 (1986). A critical part of the determination of whether a particular plaintiff is entitled to protection is whether she is "foreseeably endangered by defendant's conduct." *Jacoves,* 11 Cal.Rptr.2d at 484. The California Supreme Court has explained that the legal duty to exercise due care so as not to create an "unreasonable risk of injury to others" extends to the "class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct[.]" *Lugtu v. California Highway Patrol,* 28 P.3d 249, 256 (2001). The court continued, "[i]t is well established, moreover, that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person." *Id.*

Although whether a duty exists is a question of law, foreseeability often is a question left for the jury to decide.[15] The allegations here that the defendants created an illegal secondary firearms market that was intentionally directed at supplying guns to prohibited gun purchasers like Furrow are more than sufficient to raise a factual question as to whether the defendants owed the plaintiffs a duty of care and whether the defendants breached that duty. As the California Supreme Court has stated, a defendant's duty of care extends to those individuals a defendant puts at an unreasonable risk of harm through the reasonably foreseeable actions of a third party. *Id.* Here, plaintiffs have alleged sufficient facts for a reasonable jury to conclude that through their distribution practices, defendants have created an illegal secondary market targeting prohibited purchasers that placed plaintiffs in a situation in which they were exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of a prohibited purchaser like Furrow.

Defendants point to the district court's conclusion that the "harm to these Plaintiffs was not foreseeable. While it might be foreseeable that some criminals might obtain Glock firearms and use them to harm others, there was no way of foreseeing that this particular individual (Furrow) would obtain a Glock firearm and use it to injure these Plaintiffs." *Ileto,* 194 F. Supp. 2d at 1053. However, the California Supreme Court has rejected a definition of foreseeability that requires identifying whether an individual plaintiff's injury

15. Whether a plaintiff is foreseeably endangered by a defendant's conduct is a question of fact, but it is often a "part of the calculus to which a court looks in defining the boundaries of 'duty.'" *Ballard,* 715 P.2d at 629 n.6.

was foreseeable in light of a particular defendant's conduct, and instead has adopted a broader categorical approach:

> The foreseeability of a particular kind of harm plays a very significant role in this calculus, but a court's task—in determining duty—is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party. The jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.

Ballard, 715 P.2d at 629 n.6 (citations omitted).

Here, plaintiffs allegations in the FAC meet the foreseeability requirements for establishing a duty and a breach of that duty. Plaintiffs allege that Glock's marketing and distribution strategy includes the purposeful oversupply of guns to police departments and the provision of unnecessary upgrades and free exchange of guns with police departments to create a supply of post-police guns that can

be sold through unlicensed dealers without background checks to illegal buyers at a profit. Glock allegedly targets states like Washington, where the gun laws are less strict than in California, in order to increase sales to all buyers, including illegal purchasers, who will take their guns into neighboring California. The ATF has provided Glock with the names of the distributors who are responsible for the sales of guns that end up in the hands of criminals, but Glock has ignored the information and continues to supply these same distributors.

It is reasonably foreseeable that this negligent behavior and distribution strategy will result in guns getting into the hands of people like Furrow who are forbidden by federal and state law from purchasing a weapon. It also is reasonably foreseeable that once these prohibited purchasers obtain the firearms, they will use them for criminal activity; Congress and the California Legislature intended to prevent buyers like Furrow, who have histories of mental illness and felony convictions, from purchasing guns in part because they understood that such individuals with guns are likely to use them to shoot innocent victims. Furthermore, the kind of harm suffered (death, serious gun shot wounds, and trauma from witnessing gun violence) is the kind of harm that is reasonably foreseeable when a person who is forbidden under federal law from purchasing guns is able to purchase an arsenal as a result of the manufacturer's distribution system.

"In determining whether defendant breached a duty of care owed to plaintiff, the magnitude of the harm likely to result from [a] defendant's conduct must be balanced against the social value of the interest which he is seeking to advance,

and the ease with which he may take precautions to avoid the risk of harm to plaintiff." *Musgrove v. Ambrose Properties,* 150 Cal.Rptr. 722, 726 (1978). The social value of the interest defendants seek to advance and the ease with which they could take readily available precautions weigh in favor of finding a breach of duty. First, plaintiffs alleged that the ATF provided manufacturers detailed reports of the distributors, dealers, and gun shows that consistently supply the guns used in crimes. Plaintiffs further alleged that the defendant manufacturers and distributors failed to utilize distribution techniques that were commonly used by other businesses to avoid distribution to illegal end users. Furthermore, the plaintiffs alleged that Glock and other defendant manufacturers negotiate contracts with distributors (including RSR) and dealers that do not include basic provisions to address the risk of acquisition of firearms by prohibited purchasers despite the fact that other forms of incentive provisions regularly were included in the contracts. According to plaintiffs, the defendants also fail to utilize basic training instruction that would help dealers and distributors recognize straw buyers or avoid distribution to illegal purchasers.

The social value of manufacturing and distributing guns without taking basic steps to prevent these guns from reaching illegal purchasers and possessors[16] cannot outweigh the public interest in keeping guns out of the hands of illegal purchasers and possessors who in turn use them in crimes

16. As noted above, federal law prohibits individuals who have been convicted of a felony and/or have a mental defect or have been institutionalized for mental illness from purchasing *or* possessing firearms.

like the one that prompted plaintiffs' action here.[17] The debate over the social value of guns generally need not enter this case; rather, we must limit our evaluation to the social value of the defendants' interest in distributing the guns in a manner alleged in the FAC as "designed to facilitate and encourage easy access by prohibited persons, such as Furrow" when the defendants have the knowledge and the means to distribute guns in a manner that would reduce the risk of access and use by prohibited persons. We conclude that the social value of this practice to the defendants is outweighed by the health and safety interests of potential victims of gun violence at the hands of prohibited purchasers.

In sum, we conclude that the allegations in the FAC, which we must accept as true on review of a Rule 12(b)(6) dismissal, are sufficient to impose a duty of care on defendants.

2. Third Parties, Causation and "Limitless Liability"

"To establish liability in negligence, it is a fundamental principle of tort law that there must be a legal duty owed to the person injured and a breach of that duty which is the

---

17. Because the dissent mis-characterizes plaintiffs' claims as products liability claims, it contends that this weighing "will require 'a jury . . . to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm," Dissent, p. 1221, quoting *Merrill,* 26 Cal.4th at 486. Again, section 1714.4 is inapposite here; the weighing described here is the weighing required by clearly established California state law for purposes of determining whether a duty of care is owed to a plaintiff. *See, e.g., Musgrove,* 150 Cal.Rptr. at 726.

proximate[18] cause of the resulting injury." *Jacoves,* 11 Cal.Rptr.2d at 484. Proximate cause "limits the defendant's liability to those foreseeable consequences that the defendant's negligence was a substantial factor in producing." *Mendoza v. City of Los Angeles,* 78 Cal.Rptr.2d 525, 530 (1998). Whether an act is the proximate cause of injury is generally a question of fact; it "is a question of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn from those facts." *Garman v. Magic Chef, Inc.,* 173 Cal.Rptr. 20, 22 (1981).

Defendants point to a New York Court of Appeals decision holding that no duty existed between a gun manufacturer and victims of a shooting. In its decision, the New York state court concluded that, when there is a third party involved, such as the shooter, a duty may arise between the manufacturer and the victim-plaintiffs but only when there is some form of a special relationship between the third person tortfeasor or between the defendants and the plaintiffs. *See Hamilton v. Beretta USA Corp.,* 750 N.E.2d 1055, 1061 (2001). However, the present case is distinguishable because the FAC does sufficiently allege a direct link between the manufacturers distribution practices and the illegal sale of the Glock gun to Furrow that he used to kill Ileto. Furthermore, California courts apply a "substantial factor"

---

18. Although the California Supreme Court has noted a preference for the use of the term "legal" causation rather than "proximate" causation, see *Mitchell v. Gonzales,* 819 P.2d 872, 879 (1991), California courts continue to use the terms interchangeably. It is clear, however, as stated in the text, that whether using the term legal or proximate to modify causation, California courts incorporate the substantial factor test into the causation analysis. *See id.*

test to determine proximate cause. The traditional notion of "but for" causation is subsumed within the substantial factor test, whereby defendants' actions may be the proximate cause of a plaintiff's injuries if those actions were a substantial factor in bringing them about. *See Mitchell v. Gonzales,* 819 P.2d 872, 878 (1991). The links alleged in the FAC are not too attenuated to meet this standard.[19]

Here, Glock was in a position to prevent the harms alleged. "The key . . . is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm." *Hamilton,* 750 N.E.2d at 1061. Plaintiffs alleged that Glock knew which distributors sold guns that were later found to be purchased by prohibited buyers and used in crimes and that Glock's marketing and distribution system essentially targeted the gun show and unlicensed sales market where background checks are not required so that illegal purchasers could buy their guns. Glock knew which distribution channels were providing guns to illegal purchasers and was in a position to use the information the ATF made available to it to modify its distribution practices or to offer training to its distributors that would help them identify straw purchasers and purchasers who would in turn sell to illegal purchasers like Furrow.

---

19. Additionally, despite the fact that a significant amount of time passed in between Glock's initial sale of the gun and Furrow's subsequent purchase and shooting, the creation of the illegal secondary market was on-going and "[p]roximity in point of time or space is no part of the definition" of proximate cause. *Osborn v. City of Whittier,* 230 P.2d 132, 136 (1951).

The Ohio Supreme Court[20] recently permitted a suit by the City of Cincinnati against gun manufacturers, trade associations, and distributors to proceed in which the city alleged nuisance, negligence, and products liability claims for the harm caused by the firearms the defendants manufactured, sold, and distributed. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (2002). Rejecting the defendants' arguments that the harm was too attenuated and that they did not have a duty to control third parties, the Ohio Supreme Court explained that

> the negligence issue before us is not whether appellees owe appellant a duty to control the conduct of third parties. Instead, the issue is whether appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a way that creates an illegal firearms market that results in foreseeable injury. Consequently, the 'special relationship' rule is not determinative of the issue presented here. Instead, the allegations of the complaint are to be addressed without resort to that rule.

Id. at 1144.

Similarly, the Ohio Supreme Court noted with approval a Massachusetts state court decision in which it recognized

---

20. Like the California Supreme Court, the Ohio Supreme Court looks to the Restatement (Second) of Torts §§ 448 and 449 in determining whether a defendant may be liable for third party acts under a negligence theory of liability. *See Federal Steel & Wire Corp. v. Ruhlin Const. Co.*, 543 N.E.2d 769, 774-75 (Ohio 1989).

that "Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs." *Boston v. Smith & Wesson,* 12 Mass. L. Rptr. 225, 2000 WL 1473568, *15. Here,

> [t]aking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus, it is affirmative conduct that is alleged—the creation of the illegal secondary firearms market. The method by which Defendants created this market, it is alleged, is by . . . selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons, or others not permitted to use firearms in Boston. Taken as true, these facts suffice to allege that Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm. Worded differently, the Plaintiffs were, from Defendants' perspective, foreseeable plaintiffs. Thus, the court need not decide whether Defendants owed a duty greater than the basic duty.

Boston, 2000 WL 1473568, at *15.

We also agree with the duty analysis of the district court for the Northern District of Ohio when it denied a Rule 12(b)(6) motion and allowed a city's negligence claims against gun manufacturers and sellers to proceed, explaining:

> [i]t cannot be said, as a matter of law, that Defendants are free from negligence because they

> do not owe Plaintiffs a duty of care. It is now, unfortunately, the common American experience that firearms in the hands of children or other unauthorized users can create grave injury to themselves and others, thus creating harm to municipalities through physical and economic injury. It is often for a jury to decide whether a plaintiff falls within the range of a duty of care and whether that duty was fulfilled . . .

White v. Smith & Wesson, 97 F. Supp. 2d 816, 828-29 (N.D.Ohio 2000)[21]

In sum, here, it cannot be said that as a matter of law no duty was owed to the plaintiffs. On the contrary, under California negligence law, the plaintiffs' complaint alleged sufficient facts to permit a jury to conclude that Glock owed

---

21. The district court in Ohio premised this statement on a definition of the test for foreseeability that is markedly similar to the test used by California courts to define when an injury is foreseeable. *Compare White v. Smith & Wesson*, 97 F.Supp.2d 816, 828 (N.D.Ohio 2000) ("The test for foreseeability is whether a reasonably prudent person, under the same or similar circumstances as the defendant, should have anticipated that injury to the plaintiff or to those in like situations is the probable result of the performance or nonperformance of an act" (quoting *Commerce & Industry Ins. Co. v. City of Toledo*, 543 N.E.2d 1188, 1192 (1989)), *with Bigbee v. Pacific Tel. & Tel. Co.*, 665 P.2d 947, 952 (1983)) ("[Foreseeable injuries] include[ ] whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct . . . One may be held accountable for creating even the risk of a slight possibility of injury if a reasonably prudent [person] would not do so.") (internal citations omitted).

a duty to the plaintiffs, that the duty was breached, and that the breach was the proximate cause of those injuries.

3. Intervening Act Was Foreseeable

As a part of their argument that the link between the harm suffered by the plaintiffs and the actions of the defendants is too attenuated, Glock and the other defendants note that it was Furrow who shot the gun and that his wrongful act was the immediate cause of the injuries suffered by Ileto and the children at the JCC. However, the fact that there was an intervening act by Furrow is not fatal to the plaintiffs' claim on a Rule 12(b)(6) motion. To the contrary, under California law, where an intervening act by a third party was foreseeable, it does not amount to a superseding cause relieving the negligent defendant of liability. In *Landeros v. Flood,* an eleven year-old girl was taken into a hospital with several injuries suggesting that she had been physically abused. 551 P.2d 389, 390 (1976). After treating the child for an unexplained broken ankle and other injuries, the treating doctor failed to report the child as a potential victim of child abuse. The child then suffered permanent injuries upon her return to her mother. *Id.* The California Supreme Court addressed the hospital's argument that, because the abuse was the immediate cause of the child's injury, its doctor's negligence could not be considered the proximate cause of the harm suffered by the child:

> Under the allegations of the complaint it is evident that the continued beating inflicted on Plaintiff by her mother and [the mother's husband] after she was released from the San Jose Hospital and

> returned to their custody constituted an 'intervening act' that was the immediate cause in fact of the injuries for which she seeks to recover. (Rest.2d Torts, section 441). It is well settled in this state, however, that an intervening act does not amount to a 'superseding cause' relieving the negligent defendant of liability if it was reasonably foreseeable: '[A]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct'.

Landeros, 551 P.2d at 395 (internal citations omitted).[22]

Plaintiffs have alleged that Glock knew that its distribution system and marketing policies would help to foster an illegal secondary gun market. This secondary market promotes illegal gun purchases by individuals who are forbidden by state and federal law from purchasing guns due to felony convictions or mental impairments. The law prohibits these individuals from purchasing and possessing firearms because lawmakers determined that they posed a

---

22. California courts have adopted the Restatement of Torts' treatment of whether a duty to foreseeable plaintiffs exists despite an intervening act in cases involving negligent acts by third parties, *see Mosley v. Arden Farms Co.,* 157 P.2d 372 (1945), as well as criminal acts by third parties, *see Richardson v. Ham,* 285 P.2d 269 (1955). *See generally, Arden Farms* 157 P.2d at 375 ("It has been held that the rules on the subject in the Restatement of Torts sections 442-453, are applicable in this state.")

greater risk of using the guns for illegal purposes. Thus, it was reasonably foreseeable that if Glock continued to foster the illegal secondary market, a person like Furrow who was prohibited by law from purchasing a gun would be able to purchase one and use the gun in the manner that was the basis for prohibiting such purchases in the first place.

Additionally, as the California Supreme Court has noted, under "section 449 of the Restatement Second of Torts . . . foreseeability may arise directly from the risk created by the original act of negligence: 'If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.'" *Landeros,* 131 Cal.Rptr. 69, 551 P.2d at 395 (internal citations omitted).

In sum, under well-established California law, we hold that the plaintiffs have alleged sufficient facts, which if established by a preponderance of the evidence, would entitle them to relief.

B. PUBLIC NUISANCE

"[A] principal office of the centuries-old doctrine of the 'public nuisance' has been the maintenance of public order—tranquility, security and protection—when the criminal law proves inadequate." *People ex rel. Gallo v. Acuna,* 929 P.2d 596, 603 (1997). Citing the Restatement (Second) of Torts

§ 821B (1979),[23] the California Supreme Court has identified five general categories of public rights that, when unreasonably interfered with, can give rise to a claim for a public nuisance: "the public health, the public safety, the public peace, the public comfort or the public convenience." *Id.* at 604. The California Supreme Court also has recognized that California's early common law categories broadly define anything that is "injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway," as a nuisance. *Id.* (citing Cal. Civ.Code § 3479).

Generally, the Restatement (Second) of Torts reflects this broad interpretation of what constitutes a public nuisance.[24] The Restatement sets forth several circumstances under which interference with a public right may be deemed intentional and unreasonable and therefore give rise to

---

23. Unless otherwise noted, all citations to the Restatement (Second) of Torts are to the 1979 edition.

24. The California Supreme Court has essentially adopted the definition of public nuisance in the Restatement (Second) of Torts, describing the publication of the Restatement (Second) as "crystall[izing]" the law of public nuisance "to such an extent that its features could be clearly delineated" into the five general categories of public rights described above. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 604 (1997).

liability for a public nuisance. The Restatement defines an intentional invasion of the public right as follows:

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
>
> (a) acts for the purpose of causing it, or
>
> (b) knows that it is resulting or is substantially certain to result from his conduct.

Restatement (Second) of Torts § 825.

Furthermore, the Restatement explains that whether interference with a public right is unreasonable should be determined by evaluating the following circumstances:

> (a) Whether the conduct involves significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect,

> and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B(2).[25]

Here, the plaintiffs allege that Glock (and all of the other defendants) market, distribute, promote, and sell their products with reckless disregard for human life and for the peace, tranquility, and economic well being of the public. Furthermore, defendants have created a firearms market that is oversaturated and their conduct have unreasonably interfered with public safety and health. By their alleged actions, defendants have caused the specific and particularized injuries to the plaintiffs. Plaintiffs further allege that Glock's (and all of the defendants') actions are ongoing and that the defendants have actual knowledge of the damaging impact of their distribution and marketing practices on the health, safety, and welfare of the California public.[26]

---

25. Note that these guidelines are connected by the disjunctive "or." *See also People ex rel. Busch v. Projection Room Theater,* 550 P.2d 600, 603-604 (1976) (noting the "substantial identity of definitions appearing in Penal Code sections 370 and 371, and Civil Code sections 3479 and 3480," and going on to restate Cal.Penal Code section 370 as broadly defining a public nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons . . .").

26. Defendants argue, and the district court agreed, that nuisance law does not apply to the lawful manufacture and sale of nor

(Cont'd)

The plaintiffs have alleged that the distribution scheme developed by gun manufacturers and distributors including defendants have unreasonably interfered with various public rights including "the public health, the public safety, the public peace, the public comfort or the public convenience." *Acuna,* 929 P.2d at 604. The California Supreme Court has adopted the Restatement of Torts's definition of a public right as one "common to all members of the general public. It is collective in nature [.]" *Id.* (quoting Restatement (Second) of Torts § 821B). Furthermore, the interference alleged here is "both substantial and unreasonable." *Id.* The California Supreme Court has looked to the Restatement of Torts to define the substantiality requirement in a public nuisance claim as proof of significant harm, harm that is "real and appreciable invasion of the plaintiff's interests," and is "definitely offensive, seriously annoying or intolerable."

(Cont'd)
defective products. *See Ileto,* 194 F.Supp.2d at 1058. Although the district court noted that no California court has addressed whether a public nuisance claim will lie under the circumstances presented in this case, it agreed with the Eighth Circuit that "if defective products cannot constitute a public nuisance, then products which function properly do not constitute a public nuisance." *Id.* (quoting *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F.Supp.2d 882, 909 (E.D.Pa.2000), *aff'd,* 277 F.3d 415 (3d Cir.2002)).

Plaintiff's nuisance claim, however, is not about the manufacture or distribution of a defective or properly functioning product. Notably, plaintiffs do not allege a product defect but rather allege affirmative conduct on the part of manufacturers and distributors that fosters an illegal secondary gun market that interfered with the public right to safety. The California Supreme Court has never limited public nuisance suits in a manner that would prevent the claim alleged here.

Id. at 605 (quoting Restatement (Second) of Torts § 821B). Facilitating the purchase of guns by individuals declared unfit to buy guns by the state and federal legislatures would qualify as "definitely offensive," and certainly more than "seriously annoying."

1. Standing to Bring the Public Nuisance Claim

The district court concluded that the majority of the plaintiffs had standing to bring a public nuisance claim. *Ileto,* 194 F. Supp. 2d at 1057. Pursuant to California Civil Code section 3493, "[a] private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Cal. Civ.Code § 3493. California courts generally have limited the group of plaintiffs with standing to sue on a public nuisance theory to plaintiffs who can "show special injury to himself of a character different in *kind*-not merely in degree-from that suffered by the general public." *Institoris v. City of Los Angeles,* 258 Cal.Rptr. 418, 424 (1989) (emphasis in original); *see also Baker v. Burbank-Glendale-Pasadena Airport Authority,* 270 Cal.Rptr. 337 (1990); Restatement (Second) of Torts § 821C(1) (1977) ("In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.").

The district court found that plaintiffs Stepakoff, Finkelstein, Kadish, and Ileto alleged harms that "meet[] the requirement that they suffer harm different in kind, rather than degree, from the general public." *Ileto,* 194 F. Supp. 2d

at 1057. The district court declined to "conclusively resolve" the issue of whether Powers, who was not shot, but witnessed the shootings and was traumatized by the events, also suffered a harm different in kind, rather than degree, from the general public because it ultimately denied all of the plaintiffs' nuisance claims on other grounds as well. *Id.*

We agree that, on the basis of the facts alleged, plaintiffs Stepakoff, Finkelstein, Kadish, and Ileto all suffered an injury, namely trauma resulting from an assault with a gun and gun shot wounds, different in kind from the general public. Furthermore, plaintiff Powers allegedly suffered "specific and direct physical and emotional injuries . . . by[the] shock to his nervous system upon experiencing and witnessing the events described herein." This harm is different in kind from the harm allegedly suffered by the general public. These physical and mental injuries are different in kind from the "danger, fear, inconvenience, and interference with the use and enjoyment of public places that affect the tenor and quality of everyday life" that plaintiffs allege are suffered by the general public.

2. Glock's Control over the Firearm When Discharged

Glock also argues that the plaintiffs failed to allege that Glock had control over the gun when the plaintiffs were injured and that such control is a necessary element of a nuisance claim. Although it is unclear under California law whether a special relationship demonstrating control over the instrument that caused the nuisance is required for showing proximate cause, *compare City of San Diego v. U.S.*

Gypsum Co., 35 Cal.Rptr.2d 876, 882 (1994) (declining to decide whether California nuisance law requires the defendant to own or control the means of causing the nuisance), *with Martinez*, 275 Cal.Rptr. at 883 (rejecting a nuisance claim because it concluded that there was no special relationship between the defendant and the third party and therefore no proximate causation), we agree with the district court that if the California Supreme Court were confronted with this issue, it would require a showing of legal or proximate causation. However, we conclude that California's law of proximate or legal cause does not contain a control requirement. "Proximate causation requires simply that the act or omission of the defendant be a 'substantial factor to the harm suffered.'" *Adams v. City of Fremont*, 80 Cal.Rptr.2d 196, 211 (1998) (quoting *Mitchell v. Gonzales*, 819 P.2d 872 (1991)). Here, as described above in our discussion of the proximate causation required for negligence liability, *see supra* at pp. 1205-1208, plaintiffs have sufficiently alleged that Glock's actions fostered an illegal secondary market that foreseeably led to a prohibited purchaser, Furrow, gaining access to firearms that he later used to kill and injure innocent people.

The Ohio Supreme Court, which, like the California Supreme Court, also has adopted the interpretation of nuisance as set forth in the Restatement (Second) of Torts,[27] rejected a similar claim by defendants who argued that they could not be held liable for the harm alleged because they

---

27. *See Cincinnati v. Beretta U.S.A., Corp.*, 768 N.E.2d 1136, quoting 4 Restatement (Second) of Torts § 821B(1) (1965) (defining a public nuisance as "an unreasonable interference with a right common to the general public.").

did not have control over the alleged nuisance at the time of the injury. "[A]ppellant alleged that appellees control the creation and supply of this illegal secondary market for firearms, not the actual use of the firearms that cause injury . . . Just as the individuals who fire the guns are held accountable for the injuries sustained, appellees can be held liable for creating the alleged nuisance." *City of Cincinnati,* 768 N.E.2d at 1143. The Ohio Supreme Court explained the relationship between control and causation as follows:

> [I]t is not fatal to appellant's public nuisance claim that appellees did not control the actual firearms at the moment that harm occurred . . . appellant alleged that appellees control the creation and supply of this illegal, secondary market for firearms, not the actual use of the firearms that cause injury. Just as the individuals who fire the guns are held accountable for the injuries sustained, appellees can be held liable for creating the alleged nuisance.

Id.; see also City of Chicago, 271 Ill.Dec. 365, 785 N.E.2d at 31.[28]

Thus, we conclude that Glock's acts as alleged in the FAC would allow a reasonable jury to conclude that the

---

28. We recognize that the plaintiffs in these public nuisance cases were cities rather than individuals. However, it is clear that under California law an individual may make a public nuisance claim. California Civil Code section 3493 provides that a "private person may maintain an action for public nuisance, if it is specially injurious to himself, but not otherwise."

defendants' acts were the cause of the plaintiffs' injury. The plaintiffs have not alleged that Glock or the other defendants had control over the guns at the time of the shooting, but this is not fatal to their public nuisance claims.

3. California Law Does Not Limit Nuisance to Property Claims

The district court concluded that a nuisance claim could not lie here by relying on a Michigan state case (a case that was cited "with approval" by the California Supreme Court in *City of San Diego*) that holds that "nuisance cases 'universally' concern the use or condition of property, not products." *Ileto,* 194 F. Supp. 2d at 1058 (quoting *Detroit Bd. of Educ. v. Celotex Corp.,* 493 N.W.2d 513, 521 (1992)). However, the district court's determination that a nuisance must be associated with property is contrary to clearly established California law. California law has never imposed such a requirement that there be some form of an injury to land or property; indeed, as noted above, California common law consistently has defined nuisance in broad terms that encompass injuries to health, or acts that are "indecent or offensive to the senses" *or* obstructions to the free use of property in any manner that might interfere with the "comfortable enjoyment of life *or* property." *Acuna,* 929 P.2d at 615 (citing Cal. Civ. Code § 3479) (emphasis added); *see also Venuto v. Owens-Corning Fiberglas Corp.,* 99 Cal.Rptr. 350, 355 (1971) ("[T]he term 'public nuisance' comprehends an act or omission which interferes with the interests of the community or the comfort and convenience of the general public and includes interference with the public

health, comfort and convenience.") (internal citations omitted).[29]

Comment h to Section 821B of the Restatement (Second) of Torts states that "unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land." Restatement (Second) of Torts § 821B, comment h; *see also City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16 (2003) (rejecting contention that public nuisance law is limited to actions involving real property or to statutory or regulatory violations involving public health

---

29. In light of these California cases and California Civil Code section 3479, the dissent's contention that we rely on out of state law to support our conclusion that under California law there is no requirement that nuisance be associated with property is puzzling. Furthermore, we have "an answer for the following twelve words—'nuisance cases 'universally' concern the use or condition of property, not products.'" Dissent at 1223, citing *City of San Diego*, 30 Cal.App. 4th at 586. The dissent fails to note that its quotation is from a citation to a Michigan Court of Appeals case, cited by the California Court of Appeal to support its contention that other "courts that have considered this question [whether plaintiffs can recover damages for defective asbestos-containing building materials under a nuisance action] have rejected a nuisance claim as a theory of recovery for asbestos contamination." *City of San Diego*, Cal.App. 4th at 586. *City of San Diego* was a products liability suit. The California Court of Appeal in *City of San Diego* addressed the plaintiff's attempt to maintain a products liability action as a nuisance action, explaining that "no California decision . . . allows recovery for a defective product under a nuisance cause of action." *Id.* This is not a products liability action; unlike *City of San Diego*, here we do not have "a products liability action in the guise of a nuisance action." *Id.* at 587.

or safety and permitting nuisance claim to go forward);[30] *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (2002) (same).

4. California law permits nuisance suits in legal, regulated industries

Additionally, the fact that the manufacture and sale of guns is legal does not prevent the plaintiffs from pursuing their nuisance claim. Here, the alleged nuisance is not premised on the legal manufacture and design of the guns or the sale of guns to individuals who are legally entitled to purchase them. On the contrary, the nuisance claim rests on the defendants' actions in creating an illegal secondary market for guns by purposefully over-saturating the legal gun market in order to take advantage of re-sales to distributors that they know or should know will in turn sell to illegal buyers. We agree with the Ohio Supreme Court's conclusion "that under the Restatement's broad definition, a public nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public." *City of Cincinnati,* 768 N.E.2d at 1142.

---

30. In Illinois, as in California, the state supreme court has adopted the Restatement (Second) of Torts definition of public nuisance. *See City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16, 24 (2002). *See also Young v. Bryco Arms*, 975 N.E.2d 1, 10-11 (2001) (citing section 821B to define public nuisance and holding that plaintiffs' complaints sufficiently pleaded a right common to the general public, unreasonable interference with that right, and resulting damages, as the elements of a cause of action for public nuisance in a case against gun manufacturers).

Appendix A

Over one hundred years ago, a California state court explained that the fact that a certain occupation or business can be performed in a legal manner does not prevent that occupation or business from becoming a nuisance when the occupation or business is performed in a manner that unreasonably infringes on a public right. *See Woodruff v. North Bloomfield Gravel Mining Co.*, 9 Sawy. 441, 18 F. 753 (1884) (explaining that although mining is lawful and regulated by statute, the "results of those acts" can become a public or private nuisance). The fact that a statute recognizes the legality of a certain occupation and makes provision for its regulation to avoid injuries does not justify or legalize such a business when it becomes a public nuisance. *See id.*

Similarly, although gun manufacturing is legal and the sale of guns is regulated by state and federal law, the distribution and marketing of guns in a way that creates and contributes to a danger to the public generally and to the plaintiffs in particular is not permitted under law. Plaintiffs allege that the defendants knew or should have known that their marketing, promotion, distribution, importation, and sale of firearms, by which each of the firearms used in the incidents alleged here came to be in the possession of a person like Furrow, would likely result in injuries of the type suffered by the plaintiffs. *See Nat'l Ass'n for the Advancement of Colored People v. Acusport, Inc.*, 271 F. Supp. 2d 435, 484 (E.D.N.Y. 2003) (finding, after trial, that the plaintiffs demonstrated that the defendants created a public nuisance and rejecting defendant gun manufacturers' defense that selling guns is legal because "[w]hile the fact that a defendant's conduct is otherwise lawful is a factor to consider in determining whether the interference with the public right

is substantial, it is no defense to an action for public nuisance. . . . That a regulatory statutory scheme exists to govern some conduct does not alone mean that conduct is fully authorized.").

We conclude that the plaintiffs have alleged sufficient facts under well established California Supreme Court nuisance law to survive the defendants' Rule 12(b)(6) motion, and therefore reverse the district court's ruling granting Glock's motion to dismiss the public nuisance claim.

5. Negligence And Nuisance Claims Against Norinco

We agree with the district court that the plaintiffs' allegation that Furrow used a 9mm gun in both shootings, and the plaintiffs' allegation that the Norinco gun used 9mm ammunition, was sufficient for purposes of the defendants' motion to dismiss to connect Norinco to plaintiffs' injuries. The general factual allegations stated in the FAC apply to all defendants, including the allegations regarding the creation of a secondary market that targets illegal gun purchasers. These general allegations include the claim that, despite the extensive documentation in ATF reports and information that identifies those distributors that provide the most guns to illegal purchasers, manufacturers and distributors, including Norinco, continue to develop distribution channels that promote straw purchases and other means of distribution that facilitate access to guns by prohibited purchasers.

We note that the specific allegations in the FAC that trace the Glock gun from the manufacturer to the police department to several distributors, including RSR, to gun collectors and

ultimately to Furrow do not apply to Norinco. However, because the general allegations included in the FAC described above satisfy all of the requisite elements for negligent distribution and public nuisance claims, we also reverse the district court's dismissal of plaintiffs' negligence and nuisance claims against Norinco.

6. Defendants Rsr Management And Rsr Group Nevada

Plaintiffs alleged with particularity the role of RSR as a distributor that enabled Furrow to obtain the Glock gun that he used to shoot and kill Ileto. Therefore, the analysis above with respect to the negligence and nuisance claims against Glock applies to RSR as well. Both were key players in the distribution scheme that allegedly targeted illegal purchasers. RSR, as the distributor, had access to the same ATF reports and, as alleged in the complaint, knew or should have known that, by furnishing Dineen with two new Glock guns and agreeing that payment did not have to be made until the former guns were sold, they were contributing to the creation of the illegal market that enabled a prohibited purchaser like Furrow to obtain the gun he used to kill Ileto and may have used to shoot the victims at the JCC. Accordingly, we reverse the district court's dismissal of the plaintiffs' negligence and nuisance claims against RSR.

7. Bushmaster, Republic Arms, Jimmy Davis, And Davis Industries

Although most of the analysis above with respect to Glock and Norinco would apply to Bushmaster, Republic Arms, Jimmy Davis, and Davis Industries if the guns they

manufactured had been fired by Furrow, a claim for nuisance and negligence cannot stand where the weapons were not actually fired. The guns produced by these manufacturers were carried by Furrow on the day of the shootings, but they were not chambered for 9mm ammunition. The facts alleged that only the Glock and Norinco guns were capable of expending the 9mm casings. The requirements for a negligence claim, including allegations that the manufacturers' breach caused the plaintiffs' injuries, cannot be met where the gun was not fired. Furthermore, under a nuisance claim, the requirement that plaintiffs allege injuries different in kind from those suffered by the general public, could not be met under these circumstances when the gun at issue was not allegedly fired. Therefore, we affirm the district court's orders dismissing plaintiffs' action against Bushmaster, Republic Arms, Jimmy Davis, and Davis Industries.

8. Lilian Ileto's Survival And Wrongful Death Claims

In addition to the nuisance and negligence claims alleged by the other plaintiffs, Lilian Ileto brought under Count I a survival claim. In Count I, Lilian Ileto sought damages for all loss or damage that Ileto sustained or incurred before death as a result of the defendants' conduct, including punitive damages that Ileto would have been entitled to recover had he lived, together with attorneys' fees and other costs. Lilian Ileto also alleged a wrongful death claim in Count II. On appeal, plaintiffs do not specifically address the wrongful death and survival claims as distinct from the negligence and nuisance claims. Plaintiffs note in their statement of the case that the FAC retained Ileto's survival and wrongful death claims, but the plaintiffs do not mention them again in their opening brief or in their statement of the issues.

However, because the survival and wrongful death claims incorporate the negligence and nuisance claims, we conclude that Lilian Ileto may continue to pursue these claims on remand.[31] Therefore, our reversal of the summary judgment against the plaintiffs on the negligence count also encompasses the summary judgment against Lilian Ileto on her wrongful death and survival claims.[32]

VIII. Commerce Clause Does Not Bar This Suit

Finally, the defendants argue that the FAC is "so broadly drafted as to manifest regulatory ambitions that run afoul of the United States Constitution." Specifically, the defendants contend that the suit would violate the Commerce Clause and the Due Process Clause because it would regulate a lawful national industry. We reject both claims.

Generally, Commerce Clause claims are brought against a state law or regulation. "In order to establish a claim under the so-called dormant Commerce Clause, [Defendants] must

---

31. California courts consistently incorporate the elements of a negligence claim into a wrongful death claim. *See, e.g., Anaya v. Superior Court,* 116 Cal.Rptr.2d 660, 662 (2002) (explaining that plaintiffs had "alleged facts sufficient to plead the elements of duty and breach for a negligence (wrongful death) cause of action.") (parenthetical in original); *see also Sandoval v. Bank of America,* 115 Cal.Rptr.2d 128, 130 (2002) (addressing petitioner's wrongful death complaint on the basis of defendant's alleged negligence).

32. With respect to the survival and wrongful death claims, the FAC set forth the necessary declarations and attachments to establish Lilian Ileto as sole heir and the one entitled to Ileto's property for intestate succession. *See* Cal. Prob.Code sections 377.30 & 377.60.

show that the state law or regulation in question penalizes interstate commerce, and does so without sufficient economic justification." *National Audubon Soc'y, Inc. v. Davis,* 307 F.3d 835, 857 (9th Cir.), *amended on denial of reh'g en banc,* 312 F.3d 416 (2002); *see also Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

However, in *BMW of North America v. Gore*, the Supreme Court noted that a statute or regulation is not necessary for asserting a dormant Commerce Clause claim: "State power may be exercised as much by a jury's [or judge's] application of a state rule of law in a civil lawsuit as by a statute." 517 U.S. 559, 572 n. 17 (1996). Additionally, the Supreme Court has explained that "it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572.

The present case is clearly distinguishable from *BMW*. First, in their FAC, plaintiffs abandoned all requests for injunctive relief and economic sanctions in the form of punitive damages to protect the rights of citizens from other states. In *BMW*, the Supreme Court vacated a punitive damages award as excessively large under the Due Process Clause. Furthermore, the "regulation" alleged by the defendants in this case could not be construed as one which purposefully or arbitrarily discriminates between residents

and nonresidents. Rather, the economic "regulation" that defendants allege is most accurately construed as a form of regulation that "has only indirect effects on interstate commerce and regulates evenhandedly." *Brown-Forman Distillers Corp. v. New York Liquor Authority,* 476 U.S. 573, 578-79 (1986). When this type of regulation is at issue, the Supreme Court has stated that we must "examine[ ] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.*

Here, the state's interest in protecting the health and safety of its residents is clearly legitimate, and whatever indirect burden an award of damages to the plaintiffs might have on the defendants, it does not approximate the public interest in protecting the health and safety of California's citizens. In sum, the defendants' Commerce Clause argument is meritless and we reject it.

CONCLUSION

For the reasons stated above, we reverse the district court's orders granting dismissal of the plaintiffs' actions against Glock, Norinco, and RSR on the negligence, public nuisance, survival, and wrongful death claims, and remand for further proceedings. We affirm the district court's orders granting dismissal of the plaintiffs' action against Bushmaster, Republic Arms, Jimmy Davis, and Davis Industries.

All parties to bear their own costs on appeal.

REVERSED in part, AFFIRMED in part, and REMANDED.

HALL, Circuit Judge, dissenting:

"Whatever personal emotions and personal views members of this court may have in this tragic case, those feelings must be put aside in resolving the narrow legal question decided here." *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 492 (2001) (Kennard, J., concurring).

I understand the majority's desire to ensure that the appellants have their day in court. But I do not concur in the majority's opinion because I believe that it runs afoul of some of our most basic duties as federal judges. When exercising our diversity jurisdiction, we are required to apply state law whether we agree with it or not. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

The majority's almost exclusive reliance on authority from outside of California speaks volumes about how a California court would rule on this case. To reach its result, the majority must look outside California because when a proper analysis of California's statutes and cases is conducted, it becomes clear that the district court correctly dismissed appellants' claims. The majority essentially overlooks California law, relying instead on cases from other jurisdictions, nonbinding legal treatises, and abstract common law principles to arrive at its conclusions. But "[t]here is no general federal common law." *Erie*, 304 U.S. at 78. Sitting in diversity, we are not free to pick and choose from the many different common law principles that have been developed in the fifty states. Our role is "to ascertain what the state law is, *not what it ought to be.*" *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497 (1941) (emphasis added).

When this case is analyzed under the applicable statute and most closely analogous California cases, this court has little choice but to affirm the district court's well-reasoned decision.

I respectfully dissent.

* * *

As I explain below, the majority commits three errors in its analysis. First, it fails to recognize that this action is a products liability action and therefore is barred by a California statute. Cal. Civ.Code § 1714.4.[1] Second, the negligence theory espoused by the majority was specifically rejected by the California Supreme Court in *Merrill v. Navegar,* 26 Cal.4th 465 (2001). Third, the nuisance theory adopted by the majority contradicts relevant California authority.

THIS PRODUCTS LIABILITY ACTION IS BARRED BY SECTION 1714.4

The question of how to characterize this civil action is not merely academic—it is dispositive. In both their negligence and nuisance claims, appellants allege that their injuries were caused by the potential of appellees' products

1. Although the statute was repealed effective January 1, 2003, its repeal does not affect this action because the Legislature did not express an intent to apply its repeal retroactively. *See Myers v. Philip Morris Companies, Inc.,* 28 Cal.4th 828, 840 (2002) ("retroactive application [of a law] is impermissible unless there is an express intent of the Legislature to do so"). Section 1714.4 was in effect when the instant action was filed and when the events giving rise to it occurred.

to cause serious injury or death. But in products liability actions, California Civil Code section 1714.4 declares that "[i]njuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product." Cal. Civ. Code § 1714.4(b)(2). Thus, the plain terms of this statute preclude appellant's theory of causation. The majority gets around this absolute bar to appellants' claims by arguing that appellants have not actually brought a products liability lawsuit. But the claims alleged by appellants can be characterized as nothing but products liability claims.

A brief history of products liability law illustrates why this is a products liability action. Today, we take for granted that a manufacturer may be held liable for foreseeable damages caused by its products. But less than a century ago, this was a foreign concept in our nation's jurisprudence. At common law, a manufacturer was immune from liability in cases where the plaintiff alleged an injury that was caused by the manufacturer's products, absent privity between the manufacturer and the plaintiff. With Justice (then-Judge) Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), the doctrine of privity as a bar to recovery in these suits began to wane. In *MacPherson,* the New York Court of Appeals allowed a driver to sue Buick in negligence after a defective tire caused him to be thrown from his car and injured, even though there was no privity between the driver and Buick-Buick had sold the car to a dealer first. *Id.* at 385-86. Soon, not only consumers, but any person who could foreseeably be damaged by a product could sue in negligence for manufacturing or design defects.

Appendix A

By 1963, even negligence was no longer a requirement, as the California Supreme Court, through Justice Traynor, established that manufacturers were strictly liable for injuries their defective products caused foreseeable victims. *See Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57 (1963). So in the span of half a century, tort law developed from effectively barring victims from suing a manufacturer for damages caused by products the manufacturer had placed in the stream of commerce, to allowing any foreseeable person who could be injured by a product to sue. This history provided the backdrop for the development of the branch of law known as products liability. No other branch of law deals with a manufacturer's liability to consumers or bystanders with whom it otherwise has no relationship for damages caused by its products.

To justify my conclusion that this is undoubtedly a products liability suit, I turn to the very case that appellants have cited most often to support their theories, *Stevens v. Parke, Davis, & Co.*, 9 Cal.3d 51 (1973). In *Stevens*, the plaintiffs alleged that the defendant drug manufacturer was negligent because it over-promoted the drug Chloromycetin with the intent that doctors would not prescribe it correctly. *Id.* at 65. This theory closely parallels what plaintiffs suggest here: the gun manufacturers over-sold their products knowing that the guns would end up in the hands of people who would misuse them. In *Stevens*, the California Supreme Court treated the action as a products liability action. *See id.* at 64 ("One who supplies a product directly or through a third person 'for another to use is subject to liability to those whom the supplier should expect to use the [product]' ") (quoting Restatement (Second) of Torts § 388, which describes failure

to warn claims in products liability law). Given the similarities between this case and *Stevens,* California courts would be required to treat this case as a products liability action. As such, it is governed by section 1714.4.

The majority insists that this a "*classic* negligence and nuisance case." At the same time, however, the majority does not cite a single case from California which relies upon a nonproducts liability theory to hold a manufacturer liable for injuries caused by the use of its products. The majority tells us this case is not about defective products; it is about "certain affirmative conduct . . . that fosters an illegal secondary gun market." But when it accepts appellees' negligent marketing argument, the majority allows itself to be persuaded by an argument that is irrelevant in tort except insofar as it tends to prove one element in a products liability cause of action. Whether the gun manufacturers sell their products with the knowledge that they will find their way to criminals may bear upon who is a foreseeable plaintiff in the event that a defective gun causes injury. But to assert that this action is not about products borders on the absurd. This case is about guns. If appellees were selling bubble gum, the case would be markedly different. Alleging a defect or failure to warn is generally necessary to prevail in a products liability suit, but it is not the *sine qua non* for bringing a suit that sounds in products liability. The nature of appellees' conduct cannot be analyzed apart from the *product* they are selling.

Under section 1714.4, appellants' claims are doomed. Both claims allege that the injuries were caused by appellees' products' potential to cause serious injury, damage, or death. However, "[i]njuries or damages resulting from the discharge

of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product." Cal. Civ. Code § 1714.4(b).[2] California law unequivocally states that these injuries and damages were proximately caused by the shooter, Buford Furrow.

I would affirm the dismissal of all claims on this statutory basis alone.

THE MAJORITY'S NEGLIGENCE THEORY WAS REJECTED BY THE CALIFORNIA SUPREME COURT IN MERRILL

The majority and appellants argue that appellees were negligent in that they breached a duty not to market their

---

2. The majority and both parties seem to assume that section 1714.4 bars all products liability suits against gun manufacturers. But section 1714.4 does nothing of the sort. Rather, it states that certain types of analyses shall not be made in products liability actions. Section 1714.4 certainly would not bar a suit based on a manufacturing defect. For example, if a person were injured by a Colt .45 that was defective because it fired a bullet backward, rather than forward, that person could still sue the manufacturer of the gun for damages. Such an action would indisputably be a products liability action. Nothing in section 1714.4 would preclude it, for the plaintiff's injuries would be caused by the defective "discharge of a firearm," not by the gun's *potential* to cause injury. Cal. Civ.Code § 1714.4(b). The gun would not "be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged." *Id.* at § 1714.4(a). Instead, the gun would be defective because it "deviate[d] from the manufacturer's intended result." *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 424 (1978).

firearms products to criminals and others likely to misuse them. But California's highest court has specifically rejected this theory.

In *Merrill v. Navegar,* the California Supreme Court held that no cause of action could lie for a claim of "negligent marketing" of firearms. 26 Cal.4th at 483. Like the incident underlying this case, the incident involved in *Merrill* was a violent tragedy of the kind which has become all too common in our nation's life. A crazed man bought an assault weapon and went on a shooting spree. Families of the victims sought to hold the manufacturers of the guns responsible under a negligence theory. In affirming the trial court's dismissal of the suit, the California Supreme Court held that section 1714.4 barred such a cause of action.

Like the majority here, the plaintiffs in *Merrill* argued that "section 1714.4 has no application to this case because it is not a product[s] liability action." *Id.* at 478. Like the majority, the *Merrill* plaintiffs argued that they sought to hold the gun manufacturer "liable for its negligent conduct, not for making a defective product." *Id.* But the California Supreme Court flatly rejected this argument, observing that negligent conduct could not be analyzed separately from product design:

> [V]irtually every person suing for injuries from firearm use could offer evidence the manufacturer knew or should have known the risk of making its firearm available to the public outweighed the benefits of that conduct, and could therefore raise a triable issue of fact for the jury. In each of these

> cases, the jury would be asked to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm. The result would be to resurrect the very type of lawsuit the Legislature passed section 1714.4 to foreclose . . .

Id. at 486.

The majority attempts to distinguish this case from *Merrill* with the allegation that appellees' marketing scheme "specifically target[ed] criminal users" as opposed to the general public. But it is a legally insignificant distinction that appellees allegedly marketed their guns to criminals intentionally, rather than just with the knowledge that criminals would obtain the guns. *See* Restatement (Second) of Torts § 8A, cmt. b (1965) ("Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."); *see also Vision Air Flight Serv. v. M/V Nat'l Pride,* 155 F.3d 1165, 1176 (9th Cir.1998) (knowledge that cargo would be destroyed is legally the same as intentionally destroying cargo); *Schroeder v. Auto Driveaway Co.,* 11 Cal.3d 908, 922 (1974) (adopting Restatement rule).

Furthermore, like the "conduct" at issue in *Merrill,* this allegedly negligent conduct cannot be analyzed without weighing a particular firearm's risks in relation to its benefits. What kind of firearm was allegedly marketed to criminals is bound up with whether appellees' marketing choices were prudent. Marketing a hunting rifle knowing it will end up in

the hands of criminals is different from marketing an assault weapon knowing it will end up in the hands of criminals. The majority's holding will require "a jury . . . to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm." *Merrill,* 26 Cal.4th at 486.

In fact, the majority's opinion invites juries to engage in this type of cost/benefit analysis. The majority states that the "social value of manufacturing and distributing guns without taking basic steps to prevent these guns from reaching illegal purchasers and possessors cannot outweigh the public interest in keeping guns out of the hands of illegal purchasers and possessors who in turn use them in crimes like the one that prompted plaintiffs' action here." Maj. Op. at 1205-1206. The majority then assures us that "[t]he debate over the social value of guns generally need not enter this case; rather, we must limit our evaluation to the social value of defendants' interest in distributing the guns" as the complaint alleges. *Id.* But section 1714.4 prohibits more than a generalized assessment of the social values of guns. It prohibits a cost/benefit analysis of specific firearms and ammunition as well. *See Merrill,* 26 Cal.4th at 480-86. And to measure "the social value of defendants' interest" in distributing specific firearms in the manner alleged, it is necessary to evaluate the social value of these firearms.

The majority's negligence theory is essentially the same theory Justice Werdegar described in her dissent in *Merrill:*

> Plaintiffs' claim of negligence is, at bottom, that defendant Navegar . . . acted without due care in distributing the TEC 9/DC9—a semiautomatic

> handgun combining portability and ease of use with an extraordinary rapidity and capacity for lethal firepower . . . Plaintiffs do not claim that the TEC 9/ DC9 is defective; nor do they even claim that defendant acted negligently *simply by making* the TEC 9/ DC9. Plaintiffs allege negligence, rather, in Navegar's *selling that firearm on the general civilian market knowing it would attract purchasers likely to misuse it,* rather than restricting sales to buyers with a lawful use for the tools of assaultive violence, such as police and military units. This theory of negligence [rests] on the allegation that particular marketing choices by Navegar were imprudent . . .

Id. at 493 (Werdegar, J., dissenting) (emphasis in the original). In defending this theory, however, Justice Werdegar stood alone.

Merrill also forecloses a theory that appellees are liable for "negligent advertising" or other efforts to reach out to people like Furrow. In *Merrill,* the California Supreme Court held that for a gun manufacturer to be liable for such conduct, a plaintiff would have to prove at least that the shooter asked for the guns used "by name." *Id.* at 491. Appellants have not alleged that Furrow asked for a Glock, or any other weapons he used, by name.[3]

---

3. If anything, the facts alleged here are less compelling than the facts alleged in *Merrill.* In *Merrill,* the plaintiffs alleged that the defendant gun manufacturer was negligent in that it marketed its guns to the general public while knowing that the guns would find their

(Cont'd)

Other California authority, too, supports dismissing this case. In *Jacoves v. United Merchandising Corp.*, the California Court of Appeal affirmed the trial court's judgment on the pleadings in favor of a firearms dealer in a negligence action attempting to hold the dealer liable for the suicide death of 20-year-old Jonathan Jacoves. 9 Cal.App.4th 88 (1992). Plaintiffs alleged that Jacoves walked into a Big-5 store and tried to buy a handgun and ammunition. When he learned that he could not purchase the gun until the statutory waiting period had passed, he left the store. *Id.* at 118, 11 Cal.Rptr.2d 468. Later, he returned to the store to buy a rifle for which there was no waiting period. "At the time of this purchase, [Jacoves] appeared youthful, confused, distraught, and trembling. He purchased a rifle and ammunition and was instructed in the use of the rifle. On that same day, he committed suicide with the Big-5 rifle." *Id.* The Court of Appeal held, as a matter of law, that such allegations were insufficient to establish that Big-5 owed Jacoves a duty of care. *Id.* The court found that Big-5 had no reason to anticipate that Jacoves "intended to commit suicide." *Id.*

(Cont'd)

way to criminals. Here, appellants allege that the appellee gun manufacturers were negligent by marketing their guns to *law enforcement* while knowing that the guns will find their way to criminals. But appellants' allegation that the gun manufacturers purposefully "over-marketed" their product to law enforcement, which made the guns reach illegal markets faster, is not legally cognizable. The complaint alleges that "to win favor among police forces" appellees would "offer[ ] incentives, deals, upgrades, and encourag [e] police departments to try out new models." FAC ¶ 147. There is nothing tortious about this behavior. In general, a manufacturer of a legal product has no duty to refrain from attempting to sell as many products as possible.

The court in *Jacoves* held the plaintiffs to a much higher burden than this majority, which merely states that the "type of harm" alleged was foreseeable and that appellees therefore owed appellants a duty of care. *Jacoves* rejected this approach. Certainly the type of harm suffered in *Jacoves*-a gunshot wound-was foreseeable. Even so, the court focused on specific conduct by specific individuals, inquiring whether Big 5 employees knew of facts that would make Jacoves' suicide reasonably foreseeable. Here, there was no allegation that appellees knew that Buford Furrow would go on a shooting spree. Yet *Jacoves* requires just such an allegation to establish a duty of care.

For all these reasons, I would affirm the district court's dismissal of the negligence claim.

THE NUISANCE THEORY IS INCONSISTENT WITH CALIFORNIA LAW

The nuisance issue is simple. The majority ought to have disposed of it easily. I quote unequivocal language from the California Court of Appeal:

> Nuisance has been described as an "impenetrable jungle." . . . Civil Code section 3479 defines a nuisance as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . ."
>
> City cites no California decision, however, that allows recovery for a defective product under

> a nuisance cause of action. Indeed, under City's theory, nuisance "would become a monster that would devour in one gulp the entire law of tort. . . ."
>
> *[N]uisance cases "universally" concern the use or condition of property, not products.*

City of San Diego v. U.S. Gypsum Co., 30 Cal.App.4th 575 (1994) (emphasis added) (citations omitted).

Despite this clear language from a California appellate court, the majority states that "the district court's determination that a nuisance must be associated with property is contrary to clearly established California law." Amazingly, as authority for the clearly established law of *California,* the majority cites the *Ohio* Supreme Court and an *Illinois* appellate court. But it is the law of California that we are obliged to interpret today, not the law of Ohio or Illinois. *Cf. Erie,* 304 U.S. at 78. No California court has ever allowed a public nuisance claim to proceed against a manufacturer for lawful products which have been lawfully placed in the stream of commerce. *See City of San Diego,* 30 Cal.App.4th at 586. It therefore comes as no surprise that the majority does not cite a single California nuisance case in which the alleged nuisance did not relate to real property.[4]

---

4. The majority maintains that the California Supreme Court "has never limited public nuisance suits in a manner that would prevent the claim alleged here." Perhaps this is true but I am aware of no principle of law dictating that a cause of action exists because the state's highest court has not rejected it.

While it devotes many pages to interpreting the Restatement and cases from foreign jurisdictions, the majority has no answer for the following twelve words: "nuisance cases 'universally' concern the use or condition of property, not products." *City of San Diego,* 30 Cal.App.4th at 586.[5]

I would affirm the dismissal of the nuisance claim.

* * *

Basic principles of federalism require us to follow the will of the California Legislature, as construed by California's highest court, when interpreting the substantive law of California. We must be especially mindful of these principles when the subject matter is sensitive and controversial and when the state's legislature and high court have addressed it. As a federal court, we may not expand the authoritative pronouncements of a state's law in search of ways to reach what we view as a just result.

In passing section 1714.4, the California Legislature exempted gun manufacturers from liability for horrific incidents like the San Fernando Valley shootings of

5. This statement was not a dictum. It was necessary to the court's decision rejecting a nuisance cause of action based upon defendant's products. In any event, a "federal court exercising diversity jurisdiction is bound to follow the considered dicta as well as the holdings of state court decisions." *Homedics v. Valley Forge Ins. Co.,* 315 F.3d 1135, 1142 (9th Cir.2003) (quoting *Rocky Mountain Fire & Casualty Co. v. Dairyland Ins. Co.,* 452 F.2d 603, 603-4 (9th Cir.1971)).

August 10, 1999. This may have been an unwise policy, but it is not a policy which we are at liberty to ignore. Like Justice Kennard in *Merrill,* I am troubled by the facts which give rise to this case. But I too am convinced that it "is not for us to question the wisdom of the Legislature's considered judgments." *Merrill,* 26 Cal.4th at 492 (Kennard, J., concurring).

The debate over the extent to which gun manufacturers should be held liable to victims of gun violence belongs in the democratic process. The public debate benefits from able advocates on all sides—we need not enter it.

I would affirm the district court's dismissal of all claims.

APPENDIX B — ORDER RE: DEFENDANT CHINA NORTH'S MOTION TO DISMISS FIRST AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED MARCH 25, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO.: CV 01-9762 ABC (RNBx).

LILIAN S. ILETO, et al.,

Plaintiffs,

v.

GLOCK, INC., et al.,

Defendants.

ORDER RE: DEFENDANT GLOCK, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

This case arises from two highly-publicized shooting incidents in the Los Angeles area in the summer of 1999. Plaintiffs, the victims and their family members, have brought suit against the manufacturers of the firearms the assailant, Buford O. Furrow, Jr., used and had in his possession at the time. The Motion to Dismiss of Glock, Inc. came on regularly for hearing before this Court on March 25, 2002. Upon consideration of the submissions of the parties, the case file, and the argument of counsel, the Court hereby GRANTS the Motion.

Appendix B

I. PROCEDURAL HISTORY

Plaintiffs Lilian Santos Ileto, sole surviving parent of the deceased, Joseph Santos Ileto; Joshua Stepakoff, a minor through his parents, Loren Lieb and Alan B. Stepakoff; Mindy Finkelstein, a minor, by her parents, David and Donna Finkelstein; Benjamin Kadish, a minor through his parents, Eleanor and Charles Kadish; and Nathan Powers, a minor through his parents, Gail and John Michael Powers, filed a Complaint in Los Angeles Superior Court on August 9, 2000, against Defendants Glock, Inc.; Glock GmbH; China North Industries Corp. ("China North" or "Norinco"); Davis Industries; Republic Arms, Inc.; Jimmy L. Davis; Maadi; Bushmaster Firearms; Imbel; The Loaner Pawnshop Too; David McGee; and 150 Doe Defendants. The Complaint alleged seven causes of action. The first two claims were brought by Ms. Ileto against all Defendants, for survival and wrongful death. The remaining claims were brought by all Plaintiffs against all Defendants: for public nuisance, negligence, negligent entrustment, and unfair business practices. The Complaint sought certification of a class, damages, and injunctive relief.

Defendants Loaner Pawnshop and David McGee successfully moved for dismissal for lack of personal jurisdiction. *See* Joint Status Report filed December 21, 2001 ("Status Report") at 3:7-8. Defendants Republic Arms, Inc. and Jimmy L. Davis answered. *Id.* at 3:8-9. The Superior Court, the Hon. Anthony Mohr, granted the demurrers of Defendants Glock, Inc. and Bushmaster Firearms, Inc., and dismissed all claims with leave to amend. *Id.* at 3:9-11.

Appendix B

Plaintiffs filed a First Amended Complaint ("FAC") on May 23, 2001.[1] The FAC retained Ms. Ileto's survival and wrongful death claims and all Plaintiffs' negligence and public nuisance claims and the prayer for damages. Plaintiffs did not reassert their remaining claims, including the class claims and the claim for injunctive relief. All Defendants who had been served joined in renewed demurrers. Status Report at 3:15.

On October 17, 2001, China North was first served with the initial Complaint. *See* Notice of Removal ¶ 1, 11. 16-17. On November 14, 2001, China North removed the action to this Court under 28 U.S.C. § 1330 and 28 U.S.C. § 1603, on the ground that it is an instrumentality of a foreign state and, therefore, this Court has original jurisdiction. *Id.* at ¶ 5. On December 6, 2001, the Court determined that removal was proper and the Court has jurisdiction over the action. *See* Civil Minutes—General dated Dec. 6, 2001.

At a status conference on January 7, 2002, the Court declined to hear the demurrers filed in the Superior Court and ordered Defendants to file any motions to dismiss under the Federal Rules of Civil Procedure within 30 days. *See* Civil Minutes—General dated January 7, 2002. On February 5, 2002, Defendants Republic Arms, Inc., Jimmy L. Davis, and Davis Industries filed a Motion to Dismiss. On February 6, 2002, Defendants Quality Parts Company and Bushmaster Firearms filed a Motion to Dismiss. On February 7, 2002, Defendants China North and Glock, Inc., each filed a Motion

1. After their dismissal, the Loaner Pawnshop Too and David McGee were not named as defendants in the FAC. *See* FAC ¶¶ 6-22. RSR Management Corporation and RSR Wholesale Guns Seattle, Inc. were named in place of two Doe defendants. *See id.* ¶¶ 15, 16.

to Dismiss.[2] The Court continued the hearing on all four motions to March 25, 2002, and set a briefing schedule. *See* Civil Minutes—General dated Feb. 11, 2002; Civil Minutes—General dated Feb. 13, 2002.

In this Order, the Court addresses the Motion to Dismiss of China North. Plaintiffs filed an Opposition on March 4, 2002, that also incorporated their Opposition to Glock, Inc.'s Motion, filed the same day. China North filed a Reply on March 11, 2002.

II. LEGAL STANDARDS

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. *See* Fed.R.Civ.P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). "The Rule 8 standard contains 'a powerful presumption against rejecting pleadings for failure to state a claim.'" *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.1997). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988); *accord Gilligan*, 108 F.3d at 249 ("A complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'").

---

2. Defendants Maadi, an Egyptian business, and Imbel, a Brazilian business, have not appeared in this Court.

Appendix B

The Court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *See Pareto v. F.D.I.C.,* 139 F.3d 696, 699 (9th Cir.1998). Moreover, the complaint must be read in the light most favorable to plaintiff. *See id.* However, the Court need not accept as true any unreasonable inferences, unwarranted deductions of fact, and/or conclusory legal allegations cast in the form of factual allegations. *See, e.g., Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir.1981).

Moreover, in ruling on a 12(b)(6) motion, a court generally cannot consider material outside of the complaint (*e.g.,* those facts presented in briefs, affidavits, or discovery materials). *See Branch v. Tunnell,* 14 F.3d 449, 453 (9th Cir.1994). A court may, however, consider exhibits submitted with the complaint. *See id.* at 453-54. Also, a court may consider documents which are not physically attached to the complaint but "whose contents are alleged in [the] complaint and whose authenticity no party questions." *Id.* at 454. Further, it is proper for the court to consider matters subject to judicial notice pursuant to Federal Rule of Evidence 201. *Mir, M.D. v. Little Co. of Mary Hospital,* 844 F.2d 646, 649 (9th Cir.1988).

Plaintiffs' negligence and public nuisance claims present questions of California state law. There are no supreme court or appellate court decisions in California that have decided these particular issues. Therefore, the Court "must consider 'all available data' to anticipate how the California Supreme Court might decide the issue." *DeSoto v. Yellow Freight Sys., Inc.,* 957 F.2d 655, 658 (9th Cir.1992) (quoting *Estrella v. Brandt,* 682 F.2d 814, 817 (9th Cir.1982)).

Appendix B

III. FACTUAL ALLEGATIONS[3]

On August 10, 1999, Buford Furrow approached the North Valley Jewish Community Center ("JCC") in Granada Hills, California. Furrow had in his possession a number of firearms: Glock's model 26, a 9mm handgun; Norinco's model 320, a 9mm rifle with an illegally shortened barrel; Maadi's model RML, a 7.62 caliber automatic rifle; Bushmaster's model XM15-E25, a .223 caliber rifle; two of Imbel's model L1A1, a .308 caliber rifle; and Davis Industries' model D-22, a .22 caliber handgun. FAC ¶ 23.

Furrow entered the JCC and shot and injured three children, one teenager, and one adult. Two of the children were Plantiffs Joshua Stepakoff and Benjamin Kadish, who were attending summer camp at the JCC. Six-year-old Joshua was shot twice in the left lower leg and left hip, fracturing or breaking a bone. Five-year-old Benjamin was shot twice in the buttocks and left leg, fracturing his left femur, severing an artery, and causing major internal injuries. Plaintiff Mandy

3. As required for a Rule 12(b)(6) motion, the Court accepts as true all material allegations in the FAC, as well as any reasonable inferences to be drawn from them. *See Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.1998). The Court may disregard allegations in the FAC if they are contradicted by facts established by reference to any documents attached as exhibits, or upon which it necessarily relies; the Court also need not accept as true allegations that contradict facts judicially noticed by the Court. *See, e.g., Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.1987); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994); *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1388 (9th Cir.1987). Neither of these actions would convert a motion to dismiss into a motion for summary judgment. *See, e.g., Branch v. Tunnell*, 14 F.3d at 454.

Finkelstein, then 16 years old and a camp counselor, was shot twice in the right leg. FAC ¶ 24. Four-year-old Nathan Powers, also a camper, witnessed the events at the JCC, which has caused him great mental suffering, anguish, and anxiety. FAC ¶ 25.

After fleeing the JCC, with the same firearms in his possession, Furrow shot and killed Joseph Ileto, an employee of the U.S. Postal Service and the son of Plaintiff Lilian Ileto, while Ileto was delivering his mail route. FAC ¶ 26.[4]

Among the evidence recovered at both crime scenes were 9mm casings. Three of the firearms in Furrow's possession used 9mm ammunition: the Norinco, the Glock, and the Davis. FAC ¶ 27. The FAC does not explicitly allege that the Norinco was used to shoot any of the Plaintiffs.

At the time of the 1999 shootings, Furrow was prohibited under federal law from possessing, purchasing, or using any firearm, having been committed to a psychiatric hospital in 1998, placed under felony indictment in 1998, and convicted of assault in the second degree on May 21, 1999, in Washington State. FAC ¶ 28.

Defendants, who are sued individually and jointly and severally, are the manufacturers, importers, marketers, distributors, and dealers of firearms found illegally and used

4. Criminal charges for the murder of Ileto and the interference with the civil rights of several of the victims were brought against Furrow in this Court on August 11, 1999, in case number CR 99-1865 NM. Furrow pled guilty to multiple counts on January 24, 2001. The Hon. Nora M. Manella sentenced Furrow to multiple life terms in prison on March 26, 2001.

in the commission of crimes in Los Angeles. FAC ¶ 6. Plaintiffs have alleged that Defendants produce, market, distribute and sell substantially more firearms than they reasonably expect to be bought by law-abiding purchasers, and they knowingly participate in and facilitate the secondary market where persons who are illegal purchasers and have injurious intent obtain their firearms. FAC ¶ 31. Furthermore, Defendants select and develop distribution channels that they know regularly provide guns to criminals. FAC ¶ 32.

Defendants derive significant revenues, amounting to a substantial portion of their total firearm revenues from the crime market. They utilize the fear generated by criminal uses of their products to promote more sales to law-abiding citizens for self-protection. FAC ¶ 36.

Defendants market their guns to get into the secondary market, a market that provides a high percentage of crime guns. FAC ¶¶ 39-40. Defendants use a two-tier distribution system, selling their firearms to distributors who then sell them through dealers. FAC ¶ 41. Defendants set the terms and conditions, including distribution policies and practices, of this distribution system. Plaintiffs allege that Defendants have the power "to modify the *1047 policies and practices of their distributors, to seek alternative distribution channels, or to establish their own." Defendant distributors, acting as agents of manufacturers, have similar control over their relationship with dealers. FAC ¶ 42.

Crime guns are sold by "kitchen table" dealers, who may be licensed but have no store; pawn shop dealers; licensed dealers; and at gun shows. FAC ¶¶ 53-55. The National

Shooting Sports Foundation, a trade association, actively promotes gun shows and has requested that its members promote them as a viable distribution channel. FAC ¶ 56. The FAC does not allege that China North is a member of this organization.

Plaintiffs allege that "the industry as a whole," including these Defendants is fully aware of the extent of the criminal misuse of firearms. The industry is also aware that the illicit market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from thousands of unsupervised but licensed dealers. FAC ¶ 59. Defendants have actual knowledge and are specifically placed on notice of crime-prone distribution channels by the ATF. FAC ¶ 62; *see also* FAC ¶¶ 64-65. Plaintiffs allege that Defendants include incentive provisions in their contracts with dealers and distributors, but do not include provisions that would discourage sales associated with an unreasonably high risk of dispersal to prohibited persons, such as multiple sales, sales to nonstocking dealers, sales to straw purchasers, and sales at guns shows. FAC ¶ 34.

"Multiple sales" are purchases of one or more firearms by a single person at the same time or over a short period of time. A report published by the Bureau of Alcohol, Tobacco and Firearms ("ATF") states that multiple sales accounted for 22 percent of firearms first sold in 1999 and traced to crime in that same year. None of the Defendants engage in business practices designed to discourage multiple sales; rather, their practices facilitate such sales. FAC ¶ 44.

"Straw purchases" are purchases by one person for another, who may be prohibited from purchasing by state or

federal law. Such sales are illegal under federal law. At least one major firearms manufacturer provides educational training to licensed dealers of its products to sensitize them to identifying straw purchases. None of the Defendants do so. FAC ¶ 46. Plaintiffs allege that "an extraordinary proportion of crime guns bought from 'high crime' gun stores were probably straw purchased[.]" FAC ¶ 50.

Defendant manufacturers do not monitor or supervise their distributors or dealers, except in ways that are aimed at maximizing profits. FAC ¶ 71. Some Defendant manufacturers have written distribution agreements that provide for the right of termination, and occasionally they have terminated or warned distributors or dealers. However, a dangerous sales practice—such as one that would make guns easily available for potential criminal use—has not been the basis for termination and is not included in the terms of the agreements. FAC ¶ 72.

Defendant manufacturers purposely avoid any connection to or "vertical integration" with the distributors and dealers that sell their products. They offer high volume monetary incentives and generally refuse to accept returns. They contractually attempt to shift all liability and responsibility for the harm done by their products. FAC ¶ 73.

Defendant manufacturers do not use available computerized inventory and sales tracking systems that are commonly and inexpensively used throughout American industry to limit and screen customers. FAC ¶ 74. Other manufacturers of dangerous products place restrictions and

limits on the distribution, distributors, and dealers of their products to avoid known detrimental consequences. Defendant manufacturers have completely failed and refused to adopt any such limits or to engage in even minimal monitoring or supervision of their distributors and dealers. FAC ¶ 75.

Defendant manufacturers do not require that their dealers and retailers be trained or instructed: (a) to detect inappropriate purchasers; (b) to educate purchasers about the safe and proper use and storage of firearms, or to require any training or instruction; (c) to inquire about or investigate purchasers' level of knowledge or skill or purposes for buying firearms; or (d) to train purchasers who intend to carry a concealed firearm about the appropriate circumstances in which to pull it out and fire it. FAC ¶ 77.

Plaintiffs allege that Defendants design, produce, and advertise their products with the illicit market as their target. FAC ¶ 35; *see also* FAC ¶ 81 ("Defendant manufacturers have increased the production of particular firearms that are popular for use by criminals."); ¶ 82 ("Defendant manufacturers have sometimes designed and advertised particular features of their products that appeal to purchasers with criminal intent."); ¶ 83 ("Defendant manufacturers design their firearms with features that are . . . attractive, useful, and not detrimental for criminal use in a burglary, robbery, street murder, or drive-by shooting."). Th e FAC contains a number of allegations about the Glock model 26, known as the "pocket rocket", and Glock's targeting of the police market as a tactic to entice the civilian market. *See* FAC ¶¶ 86-90, 93-95. The FAC makes no similar

allegations regarding any Norinco weapons or China North's particular distribution scheme.

Plaintiffs allege that the Glock pistol used by Furrow to kill Joseph Ileto was a former police gun. The FAC traces the gun from Glock to Furrow. *See* FAC ¶ 148-150. The FAC does not similarly trace the Norinco weapon.

IV. DISCUSSION

In a number of cases across the country, both city governments and individual victims of gun violence, like Plaintiffs here, have brought negligent distribution and nuisance claims against gun manufacturers and distributors. The Court's review of the resulting decisions reveals that most courts have declined to impose liability on the firearm manufacturers. *See Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3rd Cir.2001); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F.Supp.2d, 882 (E.D.Pa.2000), *aff'd* 277 F.3d 415 (3rd Cir.2002); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (2001); *but see City of Boston v. Smith & Wesson Corp.*, No.1999-2590, 2000 WL 1473568 (Mass.Super.Ct. July 13, 2000); *Young v. Bryco Arms*, __ N.E.2d __, Nos. 1-01-739, 1-01-740, 1-01-742, 2001 WL 1665427 (Ill.App.Ct. Dec. 31, 2001). The Court finds these other opinions to be persuasive authority, but is at all times bound by the precedent established by California court decisions in anticipating how the California Supreme Court would decide this motion.

Appendix B

China North has moved to dismiss Plaintiffs' First Amended Complaint on three grounds: first, Plaintiffs cannot maintain a negligence action, and second, Plaintiffs cannot maintain a public nuisance action. China North also argues that because Mrs. Ileto's two claims are subsumed within the negligence and public nuisance causes of action, they should be dismissed as well. *See* Motion at 3 n.5. Plaintiffs do not respond to this contention. Neither Plaintiffs nor China North address whether any of the individual Plaintiffs might be differently situated with respect to the Motion than the others (*e.g.*, Plaintiff Nathan Powers was not shot).

A. Whether Plaintiffs Have Stated a Claim for Negligence

Plaintiffs allege that Glock was negligent in adopting marketing strategies that caused their firearms to be distributed and obtained by Furrow, resulting in injury and death to Plaintiffs. FAC ¶¶ 141-158. Specifically, they allege that:

> the particular firearms used by Furrow in these incidents . . . were marketed, distributed, imported, promoted, or sold [by China North] in the high-risk, crime-facilitating manner and circumstances described herein, including gun shows, 'kitchen table' dealers, pawn shops, multiple sales, straw purchases, faux 'collectors,' and distributors, dealers and purchasers whose ATF crime-trace records or other information defendants knew or should have known identify them as high-risk.

FAC ¶ 156. To prevail on their negligence claim, Plaintiffs must show that Glock owed them a legal duty, that it breached that duty, and that the breach was a proximate or legal cause of their injuries. *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 477 (2001) (citing *Sharon P. v. Arman, Ltd.*, 21 Cal.4th 1181, 1188 (1999)). China North contends that Plaintiffs have failed to allege facts that would support a finding that China North owed them a duty or that China North's breach of any such duty was a proximate cause of their injuries.

1. Duty

"Fundamentally, a defendant owes a legal duty of care to persons who are foreseeably endangered by the defendant's conduct, but a defendant has no duty to control the conduct of another or to warn others endangered by another's conduct." *Jacoves v. United Merchandising Corp.*, 9 Cal. App.4th 88, 114 (1992). The existence and scope of duty are legal questions for the Court. *Merrill*, 26 Cal.4th at 477 (citing *Ann M. v. Pacific Plaza Shopping Ctr.*, 6 Cal.4th 666, 674 (1993)).

China North first contends that the negligence claim is barred by California Civil Code § 1714.4, which provides:

> (a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) For purposes of this section:

(1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.

(2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.

Cal. Civil Code § 1714.4 (subsections c and d omitted) ("section 1714.4"). China North relies on the decisions in *Merrill v. Navegar, Inc.*, 26 Cal.4th 465 (2001), and *Casillas v. Auto-Ordnance Corp.*, No. C 95-3601 FMS, 1996 WL 276830 (N.D.Cal. May 17, 1996), both of which found that, in light of section 1714.4, gun manufacturers owed no duty to the victims of gun violence. The Court finds that both cases are distinguishable and that section 1714.4 does not by its terms bar the negligence action.

The plaintiff in *Casillas* alleged that the defendant had been negligent "in manufacturing a weapon that is disproportionately associated with criminal activity and that has no legitimate sporting or self-defense purpose [.]" 1996 WL 276830, *1. The distinction is obvious: *Casillas* involved an allegation of negligent **manufacture**, while the instant

action involves a claim of negligent **distribution**. *See* FAC ¶ 156 (alleging that the firearms "were marketed, distributed, imported, promoted, or sold in [a] high-risk, crime-facilitating manner"). Plaintiffs here allege that China North had a greater role in getting its firearms into the hands of one who would use it to do mischief than merely designing a "legal, nondefective" product. *Id.* at * 2. In *Casillas,* in contrast, the claim arose from the physical design of the gun. *See id.* at *3 ("Plaintiffs claim that defendant 'should have known' that the Thompson is 'particularly well adapted to a military style assault[.]'").

Unlike *Casillas, Merrill* did involve allegations of negligence in marketing and selling, as well as manufacturing, firearms. 26 Cal.4th at 473. However, *Merrill* is nonetheless distinguishable from this case. The *Merrill* plaintiffs alleged that the defendant was negligent in "'releasing the weapons for sale to the **general public** even though it knew.or should have known that the **TEC-9 was particularly attractive to criminals and particularly suited for mass killings**.'" 26 Cal.4th at 474 (emphasis added). That is, even the negligent sale claim was based on the **dangerous design** of the particular firearm at issue. Additionally, the *Merrill* plaintiffs claimed that the defendant was negligent in selling the firearm generally, rather than through crime-prone distribution channels.

The *Merrill* court found that section 1714.4 applied to the plaintiffs' claims because they alleged that the defendant had "'**designed** . . . a weapon uniquely suited for mass killing and lacking legitimate civilian uses.'" 26 Cal.4th at 480

(emphasis added). Additionally, the *Merrill* court found that the plaintiffs had brought a products liability action because "implicit in . . . products liability is that the defendant manufacturer was 'engaged in the business of distributing goods to the public.'" *Id.* at 481 (quoting *Vandermark v. Ford Motor Co.,* 61 Cal.2d 256, 262 (1964)). The Court, then, "'view[ed]' [the] claims of negligent distribution to the general public 'as being essentially design defects in disguse[.]" *Id.* (quoting Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers,* 64 Brook. L.Rev. 681, 684 (1998)).

In contrast to *Merrill,* Plaintiffs here do not allege that China North is negligent in distributing its firearms to the general public. Rather, they contend that China North's distribution scheme specifically targets criminal users. *See* FAC ¶ 32 ("Defendant manufacturers and distributors select and develop distribution channels that they know regularly provide guns to criminals and underage users."); ¶ 156 ("Defendants' practices knowingly facilitate easy access to their deadly products by people like Furrow.").[5] Accordingly, the Court finds that the *Merrill* court's "general public" analysis does not apply to this action.

---

5. Many of the allegations in Plaintiffs' FAC, such as that Defendants have engaged in a "concerted effort to promote handguns to women and youth," *see* FAC ¶ 99, *see also id.* ¶¶ 100-101, are irrelevant to the claim that Defendants are negligently distributing firearms to criminal users. In viewing the FAC in the light most favorable to Plaintiffs, the Court disregards these irrelevant allegations.

Despite the fact that *Merrill* and *Casillas* and section 1714.4 are distinguishable from this action, the rest of the analysis in *Merrill* is persuasive. Similarly, the Court must give weight to section 1714.4 as an expression of the policy concerns of the California legislature. *See Casillas,* 1996 WL 276830, *2 ("The Court believes that the California Supreme Court would not expand California law to permit liability against a manufacturer under the more narrow standards of negligence or strict liability, when California law does not permit the same action under the broader umbrella of product liability law.").[6]

Although the thrust of Plaintiffs' complaint is that China North has been negligent in structuring and maintaining its distribution scheme, the FAC does contain specific allegations about the **design** of certain China North guns. *See* FAC ¶ 35 ("Defendant manufacturers **design** . . . their products with the illicit market as their target") (emphasis added); *id.* ¶ 81 ("Defendant manufacturers have increased the production of particular firearms that are popular for use by criminals."); *id.* ¶ 82 ("Defendant manufacturers have sometimes **designed** and advertised **particular features** of their products that appeal to purchasers with criminal intent.") (emphasis added); *id.* ¶ 83 ("Defendant manufacturers **design** their firearms with **features** that are unnecessary or detrimental for use by a law-abiding person seeking self-protection in his or her home but are attractive, useful, and not detrimental for criminal use") (emphasis added). To the

6. The same policy is reflected in the Ninth Circuit's decision in *Moore v. R.G. Industries, Inc.,* 789 F.2d 1326 (9th Cir.1986) (relying on section 1714.4 to reject a defective design claim for a properly operating handgun).

extent that Plaintiffs rely on these allegations, the negligence claim must fail under the reasoning of *Merrill* and *Casillas* and the policies expressed by section 1714.4.

The remainder of the allegations more resemble a negligent entrustment claim than a negligent manufacture claim. *See, e.g.,* FAC ¶ 61 ("Defendant manufacturers repeatedly and continually use marketing strategies and distribute their firearms through distribution channels, including specific distributors and dealers, gun shows, telemarketers, and 'kitchen table' and 'car trunk' dealers, that they know or should know regularly yield inordinate numbers and proportions of criminal end users."). The *Merrill* court suggested that negligent entrustment claims are not barred by section 1714.4. *See* 26 Cal.4th at 483-84. This is not a true negligent entrustment claim, however, because there is no allegation that China North actually and knowingly entrusted its firearms to Furrow. *See Rocca v. Steinmetz,* 61 Cal.App. 102, 109, 214 P. 257 (1923) (negligent entrustment claim arises when a supplier allows a person he knows to be incompetent or reckless to use his property).[7] Accordingly, the Court now turns to the question of whether China North had a duty to plaintiffs to alter its distribution scheme.

California courts consider the following factors in determining if the defendant owes the plaintiff a legal duty:

---

7. Because Plaintiffs have not alleged how the Norinco got from China North to Furrow, they cannot state a claim for negligent entrustment to a distributor. Even if they had done so, such a claim would likely fail. *See Ileto v. Glock*, No. 01-9762, slip op. at 19 n.8 (C.D. Cal. Mar. 25, 2002) (order granting Glock's Motion to Dismiss).

(1) the foreseeability of the harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered an injury; (3) the closeness of the connection between the defendant's conduct and the plaintiff's injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the burden on the defendant and the consequences to the community of imposing a duty with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved. *Merrill,* 26 Cal.4th at 477 (citing *Rowland v. Christian,* 69 Cal.2d 108, 112 (1968)). Neither party addresses these factors.

The Court finds that the first and third factors are dispositive in this case. "The injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her [.]" *Hamilton v. Beretta U.S.A. Corp.,* 96 N.Y.2d 222, 232 (2001) (finding that the defendant gun manufacturer owed no duty to the relatives of individuals killed by handguns in a claim for negligent marketing). The harm to **these** Plaintiffs was not foreseeable. While it may be foreseeable that some criminals might obtain Norinco firearms and use them to harm others, there was no way of foreseeing that this particular individual (Furrow) would obtain a Norinco firearm and use it to injure these Plaintiffs. Additionally, Plaintiffs have not alleged that Norinco had a special relationship with them or with Furrow that would have made the harm foreseeable. *See Martinez v. Pacific Bell,* 225 Cal.App.3d 1557, 1566 (1990) ("The general rule of law is that no duty to control a third party's conduct exists in the absence of some special relationship creating such a duty."); *cf. Casillas,* 1996 WL 276830, *3 ("Plaintiffs present no

evidence of a special relationship between Auto-Ordnance and Gomez or between Auto-Ordnance and plaintiffs.").[8]

The connection between China North's conduct and Plaintiffs' injury is extremely attenuated. "Foreseeability cannot be based on speculation upon future actions of individual purchasers of firearms from legally licensed dealers not emp;loyed by the defendants herein." *City of Philadelphia v. Beretta U.S.A., Corp.,* 126 F.Supp.2d 882, 900 (E.D.Pa.2000), *aff'd* 277 F.3d 415 (3rd Cir.2002). *See also Hamilton,* 96 N.Y.2d at 234 ("[T]he connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief."). Additionally, the immediate cause of Plaintiffs' injuries was the independent, intentional, criminal act of

---

8. A special relationship may exist when one supplies " 'a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use. . . .' " *Jacoves,* 9 Cal.App.4th at 115 (quoting *Prosser & Keeton on Torts* § 33, p. 199 (4th ed.1971)). In particular, a supplier has a duty not to provide firearms "to an individual whose use of the instrumentality the supplier knows, or has reason to know, will result in injury." *Id.* at 116 (citing *Warner v. Santa Catalina Island Co.,* 44 Cal.2d 310, 317 (1955); *Talbott v. Csakany,* 199 Cal.App.3d 700, 706 (1988)). But Glock did not sell the firearm to Buford Furrow directly and had no reason to know that Furrow would ultimately receive the firearm, that he was likely to use it in a dangerous manner, or that Plaintiffs would be at risk.

Buford Furrow. *Cf.* Cal. Civil Code § 1714.4(b)(2) ("Injuries . . . resulting from the discharge of a firearm . . . are proximately caused by the actual discharge of the product.").

With regard to the moral blame factor, the Court observes that the neither the federal nor state legislature has imposed the duty Plaintiffs seek to impose here. This suggests a legislative judgment that Glock and the other gun manufacturers are not morally blameworthy in maintaining their current distribution systems. *Cf. City of Philadelphia,* 126 F.Supp.2d at 899 ("Indeed, public policy would seem to be opposed to a duty on gun manufacturers to police the federally licensed firearms dealers. When given the opportunity, the legislature has refused to extend liability into the area which the City proposes.").

The cases upon which Plaintiffs rely do not support the conclusion that Glock owed Plaintiffs a duty. In *Stevens v. Parke, Davis & Co.,* 9 Cal.3d 51 (1973), the California Supreme Court affirmed a jury verdict against the defendant for negligently overpromoting a drug that resulted in the plaintiffs' decedent's death. In *Stevens,* the decedent was a member of the relatively small group of individuals who had the illness the drug was designed to treat. Additionally, physicians like the decedent's doctor were targeted by the defendant's promotional materials. Accordingly, it was foreseeable that this physician would prescribe the drug to treat this patient. The standard the *Stevens* court applied in affirming the defendant's liability reinforces the Court's conclusion that there was a much closer connection between

the defendant's conduct and the plaintiffs' injury in *Stevens* than in this case:

> One who supplies a product directly or through a third person 'for another to use is subject to liability to those whom the supplier should expect to use the [product] with the consent of the other . . . for physical harm caused by the use of the [product] in the manner for which and by a person for whose use it is supplied, if the supplier . . . has no reason to believe that those for whose use the [product] is supplied will realize its dangerous condition. . . .'

9 Cal.3d at 64 (citation omitted) (alterations in original). In *Stevens,* the decedent used the drug with the consent of the pharmacist to whom it was supplied, the drug was used to treat the disease for which it was intended, and the defendant had no reason to believe that the decedent would be aware of the dangerous condition. In this case, in contrast, no one consented to Furrow's attack on Plaintiffs and all parties, including Furrow, were aware of the gun's dangerous properties.

Similarly, in *Ratcliff v. San Diego Baseball Club,* 27 Cal.App.2d 733 (1938), the plaintiff was a member of the foreseeable group of individuals who could be injured—patrons who had purchased tickets for a baseball game. *See id.* at 736 (finding a duty to protect those "in the area where the greatest danger exists and where such an

occurrence is reasonably to be expected").[9] This group is much smaller than the group to which Plaintiffs here belong, the general public. *Cf. Hamilton,* 96 N.Y.2d at 233-34, 727 N.Y.S.2d 7, 750 N.E.2d 1055 ("The pool of possible plaintiffs is very large—potentially, any of the thousands of victims of gun violence.").

In *Reida v. Lund,* 18 Cal.App.3d 698 (1971), the California court held that the defendant parents could be liable for negligently failing to keep their military rifle out of the hands of their son, who used the rifle to shoot and kill several people on a highway. The Court did not discuss whether the injury to the deceased was foreseeable. Rather, it was informed by the policy expressed in California Civil Code § 1714.3, which makes a parent liable for injury proximately caused by the discharge of a firearm by his child. *See id.* at 705. This is a very different policy than that expressed by section 1714.4, which seeks to absolve the gun manufacturers of liability. Additionally, the connection between the parents' actions in *Reida,* leaving the gun accessible, and their son's use of that gun is much closer

9. Similarly, in *Cantwell v. Peppermill, Inc.,* 25 Cal.App.4th 1797 (1994), the court held that owners of a bar could be held liable for the actions of those on the premises for injuries to others on the premises. *See id.* at 1803 ("an innkeeper cannot with impunity encourage or permit its patrons to become drunk and belligerent to the point where they start assaulting other guests"). *See also Pamela L. v. Farmer,* 112 Cal.App.3d 206 (1980) (finding that wife could be held liable on a negligence theory for inviting the minor plaintiffs to her home when it was reasonably foreseeable that her husband would molest them if left alone with them). Glock did not specifically invite Buford Furrow to use its weapons, nor was it present when he actually used them.

than the connection between China North's actions and Furrow's use of the Norinco in this case.

Because of the lack of foreseeability of the injury to Plaintiffs and the attenuated connection between China North's actions and Plaintiffs' injuries, the Court finds that China North owed no legal duty to Plaintiffs to alter its distribution scheme. *Cf. Holmes v. J.C. Penney Co.*, 133 Cal.App.3d 216, 220 (1982) ("These acts countermand against finding that Penney's has a duty to police purchasers who may be purchasing CO2 cartridges to power pellet guns, absent actual knowledge that the purchaser so intends.").

2. Proximate Cause

China North also argues that even if it owed a duty to Plaintiffs, its actions were not the proximate cause of Plaintiffs' injuries. "'[T]he issue of proximate cause ordinarily presents a question of fact. However, it becomes a question of law when the facts of the case permit only one reasonable conclusion.'" *Martinez v. Pacific Bell*, 225 Cal.App.3d 1557, 1566 (1990) (quoting *Capolungo v. Bondi*, 179 Cal.App.3d 346, 354 (1986)). The Court agrees that the facts alleged in this case allow only one conclusion: that the "independent and intervening intentional act[s]," *id.* at 1565, of Buford Furrow were the proximate cause of Plaintiffs' injuries, absolving China North of liability under Plaintiffs' theory.[10]

---

10. The fact that Plaintiffs have not specifically alleged that Furrow actually shot the Norinco firearm in his possession is not dispositive of the question of probable cause. Plaintiffs allege that

(Cont'd)

Appendix B

Again, the Court must keep in mind the policy expressed by section 1714.4. That section provides that, in a product liability action, "[i]njuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product." Cal. Civil Code § 1714.4(b)(2). Obviously, this is not a products liability action and Plaintiffs have not alleged that their injuries were caused by the firearms' dangerous properties. Nevertheless, section 1714.4 evidences an intent to hold shooters, not manufacturers, liable for gun violence.

It is true that "an intervening act [by a third party] does not amount to a 'superseding cause' relieving the negligent defendant of liability [.]" *Landeros v. Flood,* 17 Cal.3d 399, 411 (1976). But that intervening act must be "reasonably foreseeable." *Id.* In *Landeros,* for example, it was reasonably foreseeable that if the defendant physicians sent a battered child home to the parents who had beaten her, the parents would beat her again. *See id.* Accordingly, the physicians could be held liable for her resulting injuries. In this case, however, even viewing the facts in the FAC as true, Buford Furrow's attack on these Plaintiffs was not foreseeable. It thus constitutes a superseding cause, absolving the defendant manufacturers of liability. *Cf. Gonzalez v. Derrington,* 56 Cal.2d 130, 133 (1961) (finding defendants not liable for selling gasoline to individuals who started a

---

(Cont'd)

Furrow used a 9mm gun and that the Norinco used 9mm ammunition. *See* FAC ¶ 27. In a Motion to Dismiss, this allegation is sufficient to connect Norinco to Plaintiffs' injuries.

fire in a bar because "the intentional misconduct of Bates and Chavez [ ] . . . constituted an independent, intervening cause" of the injuries to the patrons in the bar).

In *City of Philadelphia,* the court rejected a negligent distribution claim for lack of proximate cause. The Court finds the analysis in that case persuasive. "According to the plaintiffs' complaint, the route a gun takes from the manufacturer's control to the streets . . . is long and tortuous, passing through several hands en route. . . . Only a distant and infirm causal relationship exists between the gun industry's distribution practices and the plaintiffs' injuries." *City of Philadelphia,* 126 F.Supp.2d at 904. *Cf.* FAC ¶¶ 148-150. Additionally, "[t]he plaintiffs have not contended that the gun manufacturers **intend[ed]** to inflict injury" upon them. *Id.* (emphasis in original).[11]

Because Plaintiffs have not alleged facts that would support a finding that China North owed them a duty or that China North's actions were the proximate cause of their injuries, the Court finds that Plaintiffs have failed to state a claim for negligence. The negligence claim must be dismissed.

---

11. The Court notes that it was the City of Philadelphia, rather than the victims of gun violence, who sued the gun manufacturers in that case. The district court observed that victims would have more of an interest in pursuing a claim against the manufacturers than the city did. 126 F.Supp.2d at 905. The Court does not read the *City of Philadelphia* decision as suggesting that victims could maintain such a negligence suit, however. In fact, most of the factors that defeated the City's claim also defeat Plaintiffs' here.

Appendix B

B. Whether Plaintiffs Have Stated a Claim for Public Nuisance

Plaintiffs secondly allege that Glock's distribution scheme creates a public nuisance by unreasonably interfering with public safety and health and undermining California's gun laws. *See* FAC ¶¶ 124-125. In California, a nuisance is:

> [a]nything which is injurious to health, including but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway. . . .

Cal. Civil Code § 3479. In determining whether Plaintiffs have alleged facts that would support a finding that Glock's actions have created a public nuisance, the Court may consider:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B(2) (1977), *adopted by People ex rel. Gallo v. Acuna,* 14 Cal.4th 1090, 1104-05 n.3 (1997). Glock contends that Plaintiffs have failed to state a nuisance claim for four reasons. The Court addresses each in turn.[12]

1. Standing

"In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind

---

12. Plaintiffs' reliance on *People v. Arcadia Machine & Tool, Inc.*, Judicial Council Coord. Proceeding No. 4095 (Cal.Super. Ct. San Diego County Sept. 19, 2000) (order overruling defendants' demurrers), is unavailing. The court's entire discussion of Plaintiffs' public nuisance claim is contained in a single sentence: "Plaintiffs have sufficiently pled conduct which could be found to be 'injurious to health, or . . . indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . .' Civ.Code § 3479." *Id.*, slip op. at 1:13-16. This Court cannot rely on such a summary conclusion in an unpublished opinion as precedent because it does not know what allegations were asserted in the plaintiffs' complaint, what arguments were made by the parties in their briefing, and what analysis was undertaken by the court. *See, e.g., United States v. Hiatt,* 527 F.2d 1048, 1051 (9th Cir.1976) (as amended) ("the two unpublished opinions on which Hiatt relies are too sketchy and unauthoritative to permit us to hold them controlling").

different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." *Restatement (Second) of Torts* § 821C(1) (1977). Glock contends that Plaintiffs do not have standing to bring this public nuisance action because they have not suffered a harm different in kind from other members of the public. China North does not make this argument, but the Court addresses it before reaching the substance of Plaintiffs' nuisance claim.

The Restatement (Second) of Torts advises, however, that "[w]hen the public nuisance causes personal injury to the plaintiff . . . the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained." *Id.* cmt. d. Plaintiff Lilian Ileto alleges that she and her son were injured when he was shot and killed by Furrow. FAC ¶ 2. Plaintiffs Joshua Stepakoff, Mindy Finkelstein, and Benjamin Kadish allege that they were injured when they were shot by Furrow. FAC ¶¶ 3-4. The Court finds that this physical harm to these Plaintiffs meets the requirement that they suffer harm different in kind, rather than degree, from the general public.

It is a closer question whether Plaintiff Nathan Powers, who was not shot, but has suffered "shock to his nervous system," FAC ¶ 5, has alleged a harm different in kind from the general public. Plaintiffs assert that "[t]he general public experiences danger, fear, inconvenience and interference with the use and enjoyment of public places that affect the tenor and quality of everyday life" because of the distribution of firearms to criminal users. Opp'n at 23:11-13. Plaintiffs have not alleged that Nathan Powers suffered any harm distinct

from those suffered by the general public. His harm was more severe because he suffered the harm from actually witnessing a shooting. That seems to be harm different in degree, rather than kind. *See Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal.App.3d 116, 125 (1971) ("[P]laintiffs are suffering a more severe irritation to [the respiratory] tract[;] such allegations merely indicate that plaintiffs and the members of the public are suffering from the same kind of ailments but that plaintiffs are suffering from them to a greater degree."). The Court need not conclusively resolve this issue, however, because Plaintiffs' public nuisance claim fails on other grounds.

2. Nuisance law does not apply to the lawful manufacture and sale of non-defective products

China North next contends that a nuisance claim requires interference with property or an underlying tort. The Court addresses each of these arguments separately. First, the manufacture and sale of a non-defective product cannot give rise to a public nuisance claim. "Public nuisance is a matter of state law, and the role of a federal court . . . is to follow the precedents of the state's highest court and predict how that court would decide the issue presented. It is not the role of a federal court to expand or narrow state law in ways not foreshadowed by state precedent." *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3rd Cir.2001).[13] No California court, in a decision

13. The *Camden County* court applied New Jersey law in rejecting a public nuisance claim against firearm manufacturers. *See* 273 F.3d at 539. In *James v. Arcadia Machine & Tool*, No. ESX- (Cont'd)

analyzing the question at any length, has addressed whether a public nuisance claim will lie in such circumstances. But the Court agrees that "if defective products cannot constitute a public nuisance, then products which function properly do not constitute a public nuisance." *City of Philadelphia,* 126 F.Supp.2d at 909 (citing *Tioga Public Sch. Dist. v. U.S. Gypsum Co.,* 984 F.2d 915, 920 (8th Cir.1993)).

In *City of San Diego v. U.S. Gypsum Co.,* 30 Cal.App.4th 575 (1994), the California appellate court rejected a nuisance claim for the installation of building materials that contained asbestos. Although, "[i]n California, a broad statutory definition of nuisance appears to embrace nearly any type of interference with the enjoyment of property . . . [,] no California decision . . . allows recovery for a defective product under a nuisance cause of action[.]" *Id.* at 585-86. Like the *City of Philadelphia* court, the *City of San Diego* court relied on the Eighth Circuit's decision in *Tioga Public School District. See id.* at 586 ("Indeed, under City's theory, nuisance 'would become a monster that would devour in one gulp the entire law of tort. . . .'") (quoting *Tioga Pub. Sch. Dist.,* 984 F.2d at 921).

(Cont'd)

L-6059-99 (N.J.Super. Ct. Essex County Dec. 10, 2001) (order granting in part and denying in part motion to dismiss), the court reached the opposite conclusion about whether the plaintiffs could state a public nuisance claim against the defendant gun manufacturers. The court observed that "New Jersey courts are not loathe to enter into new territory where a loss has been suffered." *James,* slip op. at 16. Like the Third Circuit in *Camden County,* however, this Court does not have the authority to expand California law in a way not obviously dictated by precedent.

"[N]uisance cases 'universally' concern the use or condition of property, not products." *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich.App. 694, 493 N.W.2d 513, 521 (1992), *cited with approval by City of San Diego*, 30 Cal.App.4th at 586.[14] Plaintiffs' claim, in contrast, deals solely with the distribution of a non-defective product. Guided by the decision in *City of San Diego* and in light of the policies expressed by section 1714.4 and by the California Supreme Court in *Merrill*, the Court concludes that Plaintiffs may not state a public nuisance claim for the distribution of firearms.[15]

---

14. Plaintiffs cite *Selma Pressure Treating Co., Inc. v. Osmose Wood Preserving, Inc.*, 221 Cal.App.3d 1601, 1619 n. 7, 271 Cal.Rptr. 596, for the proposition that California courts do not "categorically relieve manufacturers or suppliers of goods from liability for nuisance." This sentence is contained in a footnote in which the appellate court explains that it "need not decide whether the absence of control over the offending property insulates one who creates or assists in the creation of a nuisance. . . ." *Id.* Accordingly, the Court interprets the footnote to mean that manufacturers may not be immune from liability simply because their product has left their control, an issue the Court addresses, *infra* § IV.B.4. Regardless of the meaning of that footnote, however, the Court is bound by the later decisions in *City of San Diego* and *Martinez*, which clearly restrict the scope of nuisance liability.

The Court also observes that although the plaintiffs in *Selma* sought to hold the defendant liable for a defective product, an unsafe waste disposal system, the nuisance that the defendant allegedly created was land-based, contamination of the water supply.

15. The Court recognizes that in *Young v. Bryco Arms*, __ N.E.2d __, Nos. 1-01-739, 1-01-740, 1-01-742, 2001 WL 1665427, *12

(Cont'd)

3. Failure to allege an underlying tort

China North next contends that Plaintiffs' nuisance claim fails because its actions that allegedly created the nuisance do not constitute an independent tort or violate a statute. The Court disagrees because no California court has ever imposed such a requirement. In fact, the opposite is true. *See, e.g., People ex rel. Gallo v. Acuna,* 14 Cal.4th 1090, 1108-09 (1997) ("Acts or conduct which qualify as public nuisances are enjoinable as civil wrongs or prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public."); *Snow v. Marian Realty Co.,* 212 Cal. 622, 625-26 (1931) ("[I]t is immaterial whether the acts be considered wilful or negligent. . . . Nor does it make any difference whether the defendants, as they contend, exercised ordinary care in handling the engine and materials. The injury to the property itself gives rise to the liability, irrespective of care or lack of care.").[16]

(Cont'd)

(Ill.App.Ct. Dec. 31, 2001), the court found the *Tioga Public School District* decision inapposite. However, in light of *Merrill* and section 1714.4, the Court concludes that *City of San Diego* is more indicative of how the California Supreme Court would treat Plaintiffs' public nuisance claim.

16. The Court notes that while *Snow* supports Plaintiffs' position that an underlying tort is not required to prevail in a nuisance claim, it also suggests that some injury to property is required, as discussed by the Court in the prior section.

"[W]hether the conduct is proscribed by statute" is just one factor the Court may consider in determining whether the defendant's actions have given rise to a public nuisance. *See Restatement (Second) of Torts* § 821B(2)(b). Plaintiffs have alleged that the other relevant factors apply here: "[w]hether the conduct involves a significant interference with the public heath, the public safety, the public peace, [or] the public comfort" and "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." *Id.* at § 821B(2)(a), (c). *See, e.g.*, FAC ¶¶ 126, 129, 130.

It is true that, in *People v. Lim,* 18 Cal.2d 872, 879 (1941), the California Supreme Court observed that "[t]he courts have thus refused to grant injunctions . . . except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance." The "statutory definition" to which the court referred was California Code of Civil Procedure § 3479. *See id.* at 875. Glock does not argue in its Motion that the proliferation of firearms, particularly among criminal users, is not "injurious to health" or does not "interfere with the comfortable enjoyment of life[.]" Cal.Code Civ. Pro. § 3479. Accordingly, the fact that Glock's actions do not constitute an independent tort or independent crime is not fatal to Plaintiffs' public nuisance claim.

4. Failure to allege that China North had control over the firearm when it was discharged

Next, China North argues that Plaintiffs have failed to allege that China North had control over the gun when Plaintiffs were injured, a necessary element of a nuisance claim. The *City of Philadelphia* court rejected the plaintiffs' nuisance claim on this ground. *See* 126 F.Supp.2d at 910-11. The California appellate court, in *City of San Diego,* declined to decide if California nuisance law requires the defendant to own or control the means of causing the nuisance. *See* 30 Cal.App.4th at 585. But in *Martinez,* a different California appellate court rejected a nuisance claim because the plaintiffs had not demonstrated proximate cause. *See* 225 Cal.App.3d at 1565-66. The Court concludes that California courts would require a showing of control or proximate cause in this case. *Cf. Camden County,* 273 F.3d at 541 (plaintiffs must demonstrate proximate cause, control, or lack of remoteness).

In *Martinez,* the court observed that "personal injuries suffered in a robbery[] are totally inconsistent with [the] historical parameters of liability and damage in a nuisance claim." 225 Cal.App.3d at 1568. In *Martinez,* the plaintiff sought to hold Pacific Bell liable for failing to remove a public telephone that allegedly attracted "undesirables," a number of whom shot the plaintiff during a robbery on the adjacent property. *See id.* at 1560. The court analogized the public telephone to a newsstand and concluded that no claim for nuisance would lie "if a customer takes a paper out of the rack and uses it to start a fire on a nearby property, even though the arson could not have occurred in precisely the

same way if the newspaper rack had not been present. . . ." *Id.* at 1569 n. 3 (citing *Gonzalez v. Derrington,* 56 Cal.2d 130 (1961)). It is, of course, possible that Buford Furrow's attack on Plaintiffs might "not have occurred in precisely the same way" if Defendants altered their distribution schemes. But the Court concludes that California courts would not allow a nuisance claim to proceed on that basis alone. Firearms, like "[p]ublic telephones[,] can be reasonably expected to attract users from the criminal element of society. Neither public policy, nor the principles of nuisance or tort law, require the company providing public telephones [or firearms] to assume the duty of preventing such users from intentionally committing crimes. . . ." *Id.* at 1569.

Plaintiffs assert that China North may be held liable under a nuisance theory that " '[i]f the defendant voluntarily raised the storm as charged in the indictment, it is no excuse for him that he could not afterwards quell it.'" *People v. Montoya,* 137 Cal.App.Supp. 784, 786 (1933) (quoting *Cable v. State,* 8 Blackf. 531 (Ind.1847)). *See also Hardin v. Sin Claire,* 115 Cal. 460 (1896); *Selma Pressure Treating Co., Inc. v. Osmose Wood Preserving, Inc.,* 221 Cal.App.3d 1601 (1990); *Shurpin v. Elmhirst,* 148 Cal.App.3d 94 (1983) (all holding that a defendant may be liable if he participated in the creation of the nuisance). But these cases are inapposite. In all the cases cited by Plaintiffs, the nuisance arose on or in the immediate vicinity of property owned by the defendant, *see, e.g., Sunset Amusement Co. v. Bd. of Police Comm'ers of the City of Los Angeles,* 7 Cal.3d 64 (1972) (defendant can be held liable for nuisance caused by patrons arriving at and leaving defendant's roller skating

rink), or exercised **direct** control over the nuisance. *See, e.g., Hardin,* 115 Cal. at 462 (defendant built and maintained obstruction blocking plaintiff's private road). In this case, China North's actual control over its firearms ceased long before the firearms reached the street, where they allegedly become a public nuisance. *Cf. Longfellow v. County of San Luis Obispo,* 144 Cal.App.3d 379, 383-84 (1983) (county could not be held liable for failure to maintain sidewalk now owned by city).

For these reasons, as well as those discussed with respect to Plaintiffs' failure to allege facts supporting a finding of proximate cause, *see supra* § IV.A.2, the Court finds that Plaintiffs have failed to allege facts that would support a finding that China North had control over the nuisance at the time Plaintiffs were injured.

5. Glock's actions were lawful

Lastly, China North argues that a nuisance claim is barred because its activities are governed by extensive federal and state regulations. This argument is not supported by California law. "'[A]lthough an activity authorized by statute cannot be a nuisance, the **manner** in which the activity is performed may constitute a nuisance.'" *Greater Westchester Homeowners Assoc. v. City of Los Angeles,* 26 Cal.3d 86, 101 (1979) (quoting *Venuto,* 22 Cal.App.3d at 129). Accordingly, the manner in which the activity is performed must be expressly authorized by the statute in order to confer immunity on a defendant in a nuisance action. *See id.* (citing *Nestle v. City of Santa Monica,* 6 Cal.3d 920, 938 n.16 (1972)); *Varjabedian v. City of Madera,* 20 Cal.3d 285, 291

(1977) ("A requirement of 'express' authorization embodied in the statute itself insures that an unequivocal legislative intent to sanction a nuisance will be effectuated. . . .").[17]

However, because California law does not support a nuisance claim for the distribution of a non-defective product and because Plaintiffs have failed to allege facts that would support a finding that China North was in control of the nuisance at the time Plaintiffs were injured, the Court finds that Plaintiffs' public nuisance claim must be dismissed.

---

17. The Court notes that, more recently, a California appellate court found that a county defendant could not be liable in nuisance for maintaining a sidewalk in disrepair because a statute required the county to furnish all services, including street maintenance, for one year after an unincorporated area became a city. *See Longfellow,* 144 Cal.App.3d at 382-84. Obviously, the statute did not expressly authorize the purported failure to maintain the sidewalk; it merely required the county to provide maintenance services. *Longfellow* may indicate that California courts are backing away from the "express authorization" requirement. But this Court is obviously still bound by the holdings of the California Supreme Court.

V. CONCLUSION

Plaintiffs have already had an opportunity to amend their Complaint. They have not sought leave to amend again. Additionally, they have not opposed China North's request for dismissal of Mrs. Ileto's individual claims. For all of the foregoing reasons the First Amended Complaint is hereby DISMISSED WITH PREJUDICE as to Defendant China North.

DATED: March 25, 2002

s/ Audrey B. Collins
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 28, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-56197

D.C. No.
CV-01-09762-ABC

LILIAN S. ILETO, an individual and mother to Joseph S. Ileto, deceased; JOSHUA STEPAKOFF, a minor, by his parents Loren Lieb and Alan B. Stepakoff; MINDY GALE FINKELSTEIN, a minor, by her parents David and Donna Finkelstein; BENJAMIN KADISH, a minor by his parents Eleanor and Charles Kadish; NATHAN LAWRENCE POWERS, a minor by his parents Gail and John Michael Powers, for himself and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

GLOCK INC., a Georgia Corporation; CHINA NORTH INDUSTRIES CORP., a Chinese entity aka Norinco; DAVIS INDUSTRIES, a California Corporation; REPUBLIC ARMS INC., a California Corporation; Jimmy L. Davis, an individual; BUSHMASTER FIREARMS, a Maine Corporation; RSR MANAGEMENT CORPORATION; RSR WHOLESALE GUNS SEATTLE INC.,

Defendants-Appellees,

Appendix C

and

MAADI, an Egyptian business entity; Imbel, a Brazilian business entity; THE LOANER PAWNSHOP TOO, a Washington Corporation; David McGee, an individual; GLOCK GMBH, an Austrian business entity,

Defendant.

Filed May 28, 2004

Before: Cynthia Holcomb Hall, Sidney R. Thomas, and Richard A. Paez, Circuit Judges

Order;
Dissent by Judge Callahan;
Dissent by Judge Kozinski

ORDER

The panel majority has voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge Hall voted to grant the petition for panel rehearing, and recommended granting the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R.App. P. 35.

The petition for rehearing en banc is denied.

Appendix C

CALLAHAN, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, KLEINFELD, GOULD, TALLMAN, BYBEE, and BEA join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the court's decision not to hear this case en banc. The opinion of the majority of the panel improperly and inaccurately interprets California's negligence and public nuisance law to expand wrongly the exposure of manufacturers. Furthermore, if California's negligence and public nuisance law were so unsettled as to allow for the majority's creative interpretation of California law, we should have certified the issues to the California Supreme Court.

A

This is indeed a tragic case. On August 10, 1999, Buford Furrow, a mentally troubled man who was prohibited by federal law from purchasing a gun, approached the North Valley Jewish Community Center (JCC) in Granada Hills, California. He was armed with a number of firearms. He entered the JCC and proceeded to shoot and injure three young children, one teenager, and one adult. Furrow fled the JCC and, later that day, shot and killed Joseph Ileto, a United States Postal worker.

This action, as it comes before this court, is not against Furrow or even against the entities that sold the weapons to Furrow, but against the entities that manufactured the weapons outside of California and sold them outside of California.

Appendix C

The plaintiffs allege that the defendant gun manufacturers and distributors produce, distribute, and sell more firearms than legal purchasers can buy, and that they knowingly facilitate, and benefit from, a secondary market where persons who are illegal purchasers and have injurious intent obtain their firearms. Plaintiffs do not allege that Glock[1] did anything illegal. Rather, they argue that Glock knew that the secondary market "regularly provides guns to criminals and underage end users," but nonetheless failed to "exercise reasonable care to protect the public from the risks created by the distribution and marketing schemes that create an illegal secondary market."

Plaintiffs also assert a broad nuisance claim. According to the plaintiffs, Glock's marketing and distribution policies "knowingly created and maintained an unreasonable interference with rights common to the general public, constituting a public nuisance under California law." Plaintiffs allege that "this interference is not insubstantial or fleeting, but rather involves a disruption of public peace and order in that it adversely affects the fabric and viability of the entire community."

The critical feature of these claims is their breadth. Again, Glock is not alleged to have done anything illegal. Rather, its liability is based on a theory that it failed to reduce profits because it allegedly knew (or a factfinder might find that it should have known) that its heightened output (all of which is legally sold) created a surplus in a secondary market, which

1. Glock is the manufacturer of one of the guns that Furrow used to injure his victims. Glock is sometimes used as a shorthand reference to all the remaining defendants.

Glock allegedly knew was utilized by "criminals and underage end users." How many other manufacturers or distributors of products that find their way into California will be burdened with similar allegations?

In the field of products liability, courts have extended concepts such as duty and causation to encompass end users and victims of defective products. Plaintiffs, however, do not allege that the underlying firearms were defective. Nevertheless, the panel in countenancing plaintiffs' theories takes product liability concepts of duty and causation and applies them to common negligence and public nuisance laws.

The potential impact of the panel's decision is staggering: Any manufacturer of an arguably dangerous product that finds its way into California can be hauled into court in California to defend against a civil action brought by a victim of the criminal use of that product. The manufacturer's liability will turn not on whether the product was defective, but whether its legal marketing and distribution system somehow promoted the use of its product by "criminals and underage end users." Thus, General Motors could be sued by someone who was hit by a Corvette that had been stolen by a juvenile. The plaintiff would allege that General Motors knew that cars that can greatly exceed the legal speed limit are dangerous, and through advertising and by offering discounts, it increased the attractiveness of the car and the number of Corvettes on the road and thus increased the likelihood that a juvenile would steal a Corvette and operate it in a injurious manner.

Appendix C

B

This is not California law. The majority of the panel admits as much when it writes, "[b]ecause we are sitting in diversity, and there are no supreme court or appellate court decisions in California that have addressed the specific claims alleged by the plaintiffs, we must attempt to determine how the California Supreme Court might decide the issue." *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir.2003). I disagree. We should not have attempted "to determine how the California Supreme Court might decide the issue," but should have certified the issue to the California Supreme Court to allow it to decide the issue in the first instance (see section G). Furthermore, if we must predict what California law is, Judge Hall's dissent accurately reflects the considerations and precedents bearing on the issues and explains why the California Supreme Court would not rule in the manner theorized by the panel.

C

The impropriety of the majority's attempt to import product liability concepts into common negligence law may be seen in its treatment of the California Supreme Court's decision in *Merrill v. Navegar, Inc.*, 26 Cal.4th 465 (2001). That case arose out of another tragic incident in which a man armed with rapid-firing handguns entered a law office in San Francisco and killed eight persons and wounded six before killing himself. *Id.* at 472.

Plaintiffs, survivors and representatives of some of the victims, sued the manufacturer of the handguns on a common

law negligence theory. *Id.* at 470, 473. Plaintiffs sought to hold Navegar liable for its decision to make guns available for sale to the general public that it "knew or should have known have 'no legitimate sporting or self-defense purpose' and which are 'particularly well-adapted to a military-style assault on large numbers of people.'" *Id.* at 474. The California Supreme Court, in a 6 to 1 decision, affirmed the trial court's grant of summary judgment for Navegar on the ground that plaintiffs' common law negligence claim was barred by California Civil Code § 1714.4. *Id.* at 491-92.

The majority here distinguishes *Merrill* by concluding that plaintiffs' claims are not barred by Cal. Civ.Code § 1714.4[2] and noting the differences between the claims in *Merrill* and this case. *Ileto,* 349 F.3d at 1200-02. The majority's differentiation of the claims in *Merrill* reflects a lack of appreciation of California law.

The majority distinguishes *Merrill* on the grounds that, there, the guns were alleged to be defective, whereas here, the plaintiffs acknowledge that the products were not defective. *Id.* at 1201. This allows the majority to opine that "this case is not a products liability case re-framed as a negligence case, but rather it is a classic negligence and

---

2. Again, Judge Hall's dissent has the better perspective that this action is a products liability action barred by Cal. Civ.Code § 1714.4. *Ileto,* 349 F.3d at 1218-20. However, the scope of the panel's opinion is enhanced by the fact that Cal. Civ.Code § 1714.4 has been repealed. Nonetheless, this does not mean that California law is as the panel opines. The repeal of Cal. Civ.Code § 1714.4 was intended to preserve causes of action as they would have existed had § 1714.4 not been enacted in 1983.

nuisance case." *Id.* at 1202. This is not a classic negligence case.

The first element of a negligence claim is duty. Glock sold the gun to a police department in Washington, and allegedly facilitated the gun's subsequent sale to a former police officer, Dineen, who had a gun store. Dineen sold the gun to a gun collector, who allegedly did not have a firearms license. He sold it to another unlicensed gun collector, who allegedly sold it to Furrow in Washington State. The concept that the manufacturer may be liable to the ultimate user or victim is accepted in product liability law, but according to the majority, plaintiffs' claim is not based on product liability. Why then should Glock be held liable for the criminal action of an end-user of a product that is not defective?

The majority answers this question by conflating duty, which is a question of law, with foreseeability. The majority reasons:

> The allegations here that the defendants created an illegal secondary firearms market that was intentionally directed at supplying guns to prohibited gun purchasers like Furrow are more than sufficient to raise a factual question as to whether the defendants owed the plaintiffs a duty of care and whether the defendants breached that duty. As the California Supreme Court has stated, a defendant's duty of care extends to those individuals a defendant puts at an unreasonable risk of harm through the reasonably foreseeable actions of a third party. Here, plaintiffs have

> alleged sufficient facts for a reasonable jury to conclude that through their distribution practices, defendants have created an illegal secondary market targeting prohibited purchasers that placed plaintiffs in a situation in which they were exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of a prohibited purchaser like Furrow.

Id. at 1204 (internal citation omitted). This is a fancy way of saying that, because plaintiffs allege that it was foreseeable that someone like Furrow would obtain and misuse a gun, ergo Glock has a duty to anyone who is harmed by Furrow's misuse of the gun.

This is not the law in California. Under California law, the concept of duty in an action alleging common law negligence is a multi-pronged inquiry, and is not limited to determining the foreseeability of harm to the plaintiffs. *See Rowland v. Christian,* 69 Cal.2d 108, 112-13 (1968). Moreover, under negligence law, a defendant has no duty to control the conduct of a third party, absent a special relationship between the defendant and the third party. *Jacoves v. United Merch. Corp.*, 9 Cal.App.4th 88, 114 (1992); *Martinez v. Pac. Bell,* 225 Cal.App.3d 1557, 1567 (1990).

The majority not only incorrectly determined that the harm to Furrow's victims was foreseeable, it also failed to address any of the remaining factors in the duty inquiry. Specifically, the panel failed to analyze: (1) the closeness of connection between the conduct of the defendant and the

injury; (2) the moral blame attached to the defendant's conduct; (3) the policy of preventing future harm; (4) the extent of the burden to the defendant; (5) the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (6) the availability, cost, and prevalence of insurance for the risk involved. *See Merrill,* 26 Cal.4th at 477 (quoting *Rowland,* 69 Cal.2d at 113).[3] As applied to plaintiffs' allegations, none of these elements support the legal conclusion that Glock owed a duty to the victims of Furrow's criminal actions.

D

The majority also improperly uses product liability concepts of causation to determine that Glock's alleged encouragement of the secondary market was the cause of the underlying injuries. First, relying principally on cases from other states, the majority concludes that it cannot disprove a negative: it cannot find that Glock owed no duty to plaintiffs. Second, relying on a medical malpractice case, *Landeros v. Flood,* 17 Cal.3d 399 (1976), the majority surmises that "it

3. Unlike negligence, strict liability law has evolved past these barriers to liability. Early on, California decided to impose strict products liability on manufacturers and others in the chain of commerce, regardless of their proximity to the injured plaintiff, of moral blame, and of the other traditional negligence considerations mentioned above. The courts reasoned that the costs of compensation could more equitably be borne by the commercial classes than the injured plaintiffs. *See, e.g., Vandermark v. Ford Motor Co.,* 61 Cal.2d 256, 262-63 (1964) (holding that a manufacturer's and a retailer's liability should be imposed irrespective of fault); *Greenman v. Yuba Power Prods. Inc.,* 59 Cal.2d 57, 63-64 (1963) (holding a manufacturer's liability should be imposed irrespective of fault).

was reasonably foreseeable that if Glock continued to foster the illegal secondary market, a person like Furrow who was prohibited by law from purchasing a gun would be able to purchase one and use the gun in the manner that was the basis for prohibiting such purchases in the first place." *Ileto,* 349 F.3d at 1209.

This approach is contrary to the law that defendants do not have a duty to control the activities of third parties, absent a special relationship. In *Martinez,* a California court noted: "Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others." 225 Cal.App.3d at 1565.

As noted by Judge Hall in her dissent, this is the clear import of *Jacoves. Ileto,* 349 F.3d at 1222-23. There, the California court held that the plaintiffs did not have a cause of action against the store that sold a "confused, distraught, and trembling" young man a rifle, which he then used to commit suicide, because, as a matter of law, the store had no duty to refuse to sell the rifle to the young man. *Jacoves,* 9 Cal.App.4th at 118. The court explained: "In order to impose a duty on Big 5 to refuse to sell the rifle and ammunition to Jonathan, the complaint must allege that Big 5 knew, or had reason to know, that Jonathan was reasonably likely to use the rifle to harm himself." *Id.* If a store that sells a rifle to a "confused, distraught, and trembling" young man does not legally foresee his use of the rifle on himself, how, under California law, may Glock be said to have legally foreseen

that a person it did not know would buy a gun in Washington State, from a seller Glock did not know, and proceed to shoot at children in Los Angeles and kill a postal worker? Unlike the fact situation in *Landeros*—a case concerning a doctor's alleged failure to diagnose and treat battered child syndrome—Glock did not know, and could not have known of Furrow, or of any of his victims.[4]

---

4. Although not decided at the time the panel issued its decision, the California Supreme Court's opinion in *Wiener v. Southcoast Childcare Centers, Inc.*, No. S116358, 2004 WL 964080 (Cal. May 6, 2004), indicates that under California law Glock could not be held to have foreseen Furrow's criminal actions.

In *Wiener*, Abrams deliberately drove his car through a four-foot-high chain-link fence that enclosed a child care facility's playground, killing two children and injuring several others. The parents of the deceased children sued the child care center alleging that the accident was foreseeable and that the chain-link fence provided inadequate protection. The California Supreme Court affirmed a grant of summary judgment for defendants. It reiterated that determining whether a duty exists involves the balancing of a number of considerations, citing *Rowland*. 2004 WL 964080, at *3. The court went on to state that its cases "analyze third party criminal acts differently from ordinary negligence, and require us to apply a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties." 2004 WL 964080, at *7. This is because, (1) "it is difficult if not impossible in today's society to predict when a criminal might strike:" and (2) "if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." *Id.*

Appendix C

E

The panel majority's holding that plaintiffs have a cause of action under a nuisance theory is also contrary to California law, as noted by Judge Hall in her dissent. *Ileto,* 349 F.3d at 1223-24. Nuisance cases have uniformly required some property to be protected against the nuisance. *See City of San Diego v. U.S. Gypsum Co.,* 30 Cal.App.4th 575, 585 (1994). Under the majority's creative theory, "nuisance' would become a monster that would devour in one gulp the entire law of tort.'" *Id.* at 586 (quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum,* 984 F.2d 915, 921 (8th Cir.1993)).

F

The disruptive impact of the majority's decision is not minimized by the fact that this appeal is from the grant of a motion to dismiss under Fed.R.Civ.P. 12(b)(6), nor is it mitigated by the fact that the majority's interpretation of California law is not binding on California courts.

If the majority's theory holds, gun manufacturers may have massive and industry-transforming potential liability for all gun-related violent crime in California. Furthermore, by converting duty and causation into a foreseeability test, the majority has created a standard that, as a practical matter, is immune from motions to dismiss under Fed.R.Civ.P. 12(b)(6) or motions for summary judgment. The very fact that a tragedy occurred—that someone was killed or injured by the defendant's product—makes its "foreseeability" a question for the factfinder, the jury.

Appendix C

The practical costs of forcing manufacturers to defend to juries all non-meritorious claims, as well as arguably meritorious claims, for all injuries that occurred in California cannot help but have a substantial impact on California's economy.

The irony of the majority's decision is that its creative interpretation of California law also burdens the federal district courts. California state courts are free to disregard the panel's decision, but federal district courts in California are not. Competent plaintiffs' lawyers will surely file their actions in federal district courts, citing diversity for jurisdiction and demanding that the district courts follow the Ninth Circuit's interpretation of California law. As these cases will be filed in federal courts, they will not provide the California Supreme Court any opportunity to correct the majority's interpretation of California law.

G

The final irony is that the panel's decision, its impact on California and manufacturers, and its infringement on principles of federalism, were avoidable. Pursuant to Rule 29.8(a) of the California Rules of Court, we could have, and should have, certified the issues of California law to the California Supreme Court.[5]

---

5. The en banc call in this case sought certification of the issues of California law to the California Supreme Court. There is precedent for certifying a question to a state supreme court after a three-judge panel has rendered an opinion. In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1,* 294 F.3d 1085, 1086 (9th Cir.2002), a three-

(Cont'd)

Appendix C

We last certified questions to the California Supreme Court in *Kremen v. Cohen,* 325 F.3d 1035, 1037-38 (9th Cir.2003). In that case, we certified questions related to Internet domain names and the tort of conversion. *Id.* We recognized that this procedure is "reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts." *Id.* at 1037. We noted that certification would not be appropriate to avoid a difficult legal issue or to sidestep our diversity jurisdiction. *Id.* at 1038. We indicated that we were aware of the "burgeoning caseload of the California Supreme Court" and "would not presume to certify a run-of-the-mill case." *Id.* Rather, in a case "that raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause[d] us to seek certification." *Id.* Judge Kozinski, dissenting from the certification, urged that "[c]ertification is justified only when the state supreme court has provided no authoritative guidance, other courts are in serious disarray and the question cries out for a definitive ruling." *Id.* at 1044.

This case meets all these criteria. To the extent that *Merrill* is distinguishable, as the majority contends, the California Supreme Court has not provided authoritative

---

(Cont'd)

judge panel heard argument and rendered a decision. Rehearing and rehearing en banc were sought. *Id.* The panel then withdrew its opinion, granted the petition for rehearing, and certified a question to the Washington Supreme Court, even though the parties at oral argument had unanimously requested that the court not certify the state law question to the Washington Supreme Court. *Id.*

guidance. The panel's opinion is likely to create disarray in federal and state courts in California. Furthermore, reflection on the potential consequences of the panel's position cries out for an initial determination by the California Supreme Court. Manufacturers are often the "deep pockets" when innocent people are killed or injured by the misuse or criminal use of dangerous products. The panel would allow manufacturers to be sued even though their products are not alleged to be defective and even though the actual perpetrator of the injury acted criminally, simply because the manufacturer allegedly sought to market more goods than the plaintiffs believe the market could safely handle.

Certification of this case is supported by our decision in *Torres v. Goodyear Tire & Rubber Co. Inc.*, 867 F.2d 1234, 1239 (9th Cir.1989), certifying to the Arizona Supreme Court the question whether a trademark licensor is strictly liable for personal injuries caused by a defective product bearing its trademark. In *Torres,* we noted that "some courts have concluded that strict liability should attach to the trademark licensor as one within the 'stream of commerce' in which the product flows." *Id.* at 1238. We listed seven cases, as well as commentators, supporting this proposition and listed no cases to the contrary. *Id.* Nonetheless, the court stated, "we hesitate prematurely to extend the law of products liability in the absence of an indication from the Arizona courts or the Arizona legislature that such an extension would be desirable." *Id.*

The discussion of strict liability in *Torres* also recommends certification in this case. We noted that the Restatement (Second) of Torts § 402A imposes strict liability

on "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property." *Id.* at 1237 (editing in original). We further commented that under Arizona law, "[s]trict liability is a public policy device to spread the risk from one to whom a defective product may be a catastrophe, to those who marketed the product, profit from its sale, and have the know-how to remove its defects before placing it in the chain of distribution." *Id.* (citations and quotation marks omitted).

The majority of the panel in this case, contrary to *Torres,* rushes to extend the equivalent of strict liability to the manufacturer of a product that the plaintiffs admit was not defective. Accordingly, there is no way that the manufacturer could remove the "defects" before placing the item into the chain of distribution. The majority, undaunted, seeks to impose liability on a manufacturer because the manufacturer's otherwise legal marketing of a non-defective product allegedly encourages an "illegal gun market." Such a determination of a state's "public policy" should be made by the state's supreme court or its legislature, rather than imposed on a state by a federal court exercising diversity jurisdiction.

Finally, in declining to certify this case to the California Supreme Court, the court fails to heed the advice of the United States Supreme Court. In *Arizonans for Official English v. Arizona,* 520 U.S. 43, 75-80 (1997), the Supreme Court vacated our decision and chastised us for not using the certification process.

> Blending abstention with certification, the Ninth Circuit found "no unique circumstances in this

> case militating in favor of certification." Novel, unsettled questions of state law, however, not "unique circumstances," are necessary before federal courts may avail themselves of state certification procedures. Those procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions. Taking advantage of certification made available by a State may "greatly simplify" an ultimate adjudication in federal court.

520 U.S. at 79 (citations, footnote and editing omitted).

H

In sum, I dissent on two separate but related grounds from our decision not to take this case en banc. First, fundamental concepts of federalism, emphasized in *Torres* and *Arizonans for Official English,* required that we certify the questions of California law to the California Supreme Court. We should not reach out to create a state's "public policy" unless there is no alternative.

Second, the majority of the panel's creative interpretation of California law is wrong and will have a deleterious impact on California, manufacturers, and the federal and state courts in California. Common negligence concepts of duty and causation do not allow the unfortunate victims of the criminal use of a dangerous, but not defective, product to recover from the product's manufacturer simply because the manufacturer's marketing schemes allegedly promoted a secondary market that purportedly facilitated the illegal purchase of the product. California law does not support this imposition of the equivalent of strict liability.

Appendix C

KOZINSKI, Circuit Judge, with whom Judges O'SCANNLAIN, KLEINFELD, GOULD, CALLAHAN and BEA, join:

Imposing novel tort theories on economic activity significantly affects the risks of engaging in that activity, and thus alters the cost and availability of the activity within the forum jurisdiction. In effect, it is a form of regulation administered through the courts rather than the state's regulatory agencies. It is, moreover, a peculiarly blunt and capricious method of regulation, depending as it does on the vicissitudes of the legal system, which make results highly unpredictable in probability and magnitude. Courts should therefore be chary of adopting broad new theories of liability, lest they undermine the democratic process through which the people normally decide whether, and to what degree, activities should be fostered or discouraged within the state. This caution applies with particular force to federal courts, whose judges are not appointed through the state's political processes, and may not even live within the states affected by their decisions. For these reasons, and those aptly stated by Judge Callahan, I respectfully dissent from our court's failure to take this case en banc.